91-1674

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA,
Respondent,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA;

[Defendants continue on overleaf]

STAR MARKET COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Defendants.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the court-appointed Teamster officers, acting under the color of law, the United States Attorney and the District Court did deprive Star Market of due process of law by effectively taking and enforcing, without notice or evidentiary hearing, a "default judgment" against Star Market, setting aside the result of a collectively bargained, lawful arbitration award?

2. Whether the court-appointed Teamster officers, the United States Attorney and the District Court did act jointly to avoid the exclusive jurisdiction of the National Labor Relations Board and the preemptive and exclusive scope of section 301 of the Labor-Management Relations Act, thereby splintering a well-established and coherent pattern of remedies under federal labor law?

LIST OF ALL PARENT COMPANIES AND SUBSIDIARIES OF EACH CORPORATION

Petitioner Star Market Company is an unicorporated division of Jewel Food Stores, Inc., a wholly-owned subsidiary of Jewel Companies, Inc., a wholly-owned subsidiary of American Stores Company, a Delaware corporation. American Stores Company is a publicly traded corporation.

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UNITED STATES OF AMERICA,

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STAR MARKET COMPANY

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Star Market Company ("Star Market"), respectfully prays that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered on January 22, 1992.

OPINIONS BELOW

The Opinion of the United States Circuit Court of Appeals for the Second Circuit is reported at 1992 U.S. App. LEXIS 1450, 139 BNA L.R.R.M 2646 and is

reprinted in the Appendix at A-8. The Opinion of the United States District Court for the Southern District of New York is reported at 776 F.Supp. 144 (S.D.N.Y. 1991) and is reprinted in the Appendix at A-25.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1). Petitioner seeks this Court's review of a decision by the Court of Appeals affirming entry by the District Court of an Order in the nature of Contempt against Petitioner and directing it to reinstate a discharged employee, contrary to a prior decision of an impartial Arbitrator, all in violation of the rights of Petitioner protected under the United States Constitution and federal law. A panel of the Court of Appeals denied Petitioner's appeal on January 22, 1992. This Petition has therefore been timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment

The Fifth Amendment of the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of...property, without due process of law, nor shall private property be taken for public use, without just compensation.

The statutory provisions involved in this case are sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§157 and 158, section 301 of the Labor-Management Relations Act, 29 U.S.C. §185, and the Racketeering Influenced and Corrupt Organizations Act, 29 U.S.C. §§1961, 1962 and 1964. These statutes, or pertinent parts thereof, are reproduced in the Appendix at A1-A6.

THE CHALLENGED CONSENT DECREE, ELECTION OFFICER DECISION AND ORDER OF CONTEMPT

On March 14, 1989, the District Court approved a Voluntary Consent Order ("Consent Decree") which ended major litigation brought by the United States Attorney for the Southern District of New York ("U.S. Attorney") against the International Brotherhood of Teamsters ("IBT" or "Teamsters"), the criminal conspiracy known as "La Cosa Nostra" and individual IBT officers. This litigation had as the government's goal to rid the IBT of organized crime influence and open IBT elections to a more democratic process. There is no record evidence even to suggest that Star Market was ever involved in any activity giving rise to the RICO complaint against the IBT and La Cosa Nostra. Neither Star Market nor any other employer had any part in either the litigation or Consent Decree.

On September 3, 1991, the Teamster "Election Officer," appointed under the Consent Decree, without any opportunity for Star Market to confront the evidence and witnesses against it or present its own evidence, issued a written final decision vacating a collectively-bargained Arbitral Award in favor of Star Market, which Award had affirmed the discharge for dishonesty of a Star Market employee. This Arbitration Award on its face and under existing federal labor laws was a final judgment on the merits of all claims raised by this employee against Star Market. On October 26, 1991, the United States Attorney requested the District Court to find Star Market in contempt for failing to "obey" the Teamster Election Officer's decision. After argument, *but without any evidentiary hearing,* the District Court affirmed the Teamster Election Officer's decision and ordered the Contempt relief jointly requested by the Unites States Attorney and the court-appointed Teamsters. The relief was such that Star Market had either to

reinstate the employee to employment, pay him all back pay and benefits or face a $10,000 a day fine.

The Consent Decree, in pertinent part, and Teamster Election Officer's summary decision are reprinted in their entirety in the Appendix at A44 and A113.

STATEMENT OF THE CASE

On September 9, 1991, while acting under color of law, the Teamster Election Officer issued a final decision, in effect a default judgment without notice, stripping Star Market of its rights under the Arbitration Award. Without notice to Star Market of the charges against it, without hearing and without any confrontation of the evidence or witnesses against it, *sua sponte,* the Teamster Election Officer rejected the Arbitration Award rendered pursuant to the collective bargaining agreement ("CBA") between Star Market and an individual Local of the IBT and sealed the evidentiary record. The Teamster Election Officer did so, solely in furtherance of Consent Decree goals sought by the federal government and/or the IBT.

The Arbitration Award had affirmed the discharge of Star Market's employee, Neal Henderson, for stealing time from his employer. The Teamster Election Officer "ordered" Henderson reinstated to his job, made whole in back pay lost, but permitted Henderson's discipline by "written warning" only. Clearly, the fact of Henderson's misconduct is not in dispute – only the penalty imposed.

On May 2, 1991, Star Market, a Boston-based food retailer, had discharged Henderson, a warehouse employee, Teamster Local shop steward and "candidate" in the 1991 IBT National Election. Henderson was discharged for an act of dishonesty – leaving his job and Star Market premises without permission and *while being paid,* a totally improper practice under the CBA. Henderson filed a grievance under the CBA and apparently filed two "Election protests" with the Teamster

Election Officer. The second of these protests serves as the factual basis for much of Petitioner's Due Process arguments to this Court.

In his *first* election protest (A61), the *only* protest ever sent to Star Market by the Teamster Election Officer, Henderson alleged that, as a "reform candidate", he was likely to suffer retaliation by his fellow Teamsters during the "Joint Committee" grievance step, a process previously dealt with by this Court in many cases.[1] Henderson's second election protest (A62) claimed that his discharge was motivated by Star Market's bias against him, based on his union activities, including his participation in the IBT election. It is important to note that this *second* election protest, alleging this company bias, was not served on Star Market until October 24, 1991, long after the Election Officer's decision – after Contempt proceedings had already been commenced.

The CBA (A57) contained a two-step grievance process, the Joint Committee step, followed by arbitration if resolution of the grievance was not there obtained. Henderson's Teamster bias election protest was sent to Star Market, but became moot when the Joint Committee deadlocked, sending the grievance to the next step – *impartial* Arbitration (A66). The Teamster Election Officer did not participate in any step of Henderson's grievance. Rather, and contrary to the Consent Decree Election Rules (A207), the Teamster Election Officer "deferred" his decision until *after* the hearings were held and *well after* an Arbitral decision was rendered (A63).

Unaware of the existence of the company bias election protest and knowing only that the Teamster bias election protest had become moot, during the arbitration

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1. *See, e.g., DeCostello v. Teamsters,* 462 U.S. 151 (1983); *Vaca v. Sipes,* 386 U.S. 171 (1967) and *General Drivers, Warehousemen & Helpers, Local Union No. 89 v. Riss & Company,* 372 U.S. 517 (1963).

hearing held on June 12, 1991, Star Market responded to all known allegations against it, confronted the known evidence and witnesses against it and introduced evidence on its own behalf. The Local Union and Henderson presented to the Arbitrator their allegations and evidence, including evidence on the issue of company bias against Henderson due to his IBT election candidacy. Weighing the evidence presented in light of the CBA, including the provision that "[T]he company and the Union agree that there will be no *discrimination by the company* or the Union against any employee because of his or her membership in the Union or because of any employee's lawful activity and/or support of the Union" (A58) (Emphasis added), the Arbitrator found that Star Market had met its burden in showing that Henderson's discharge was "justified" under the CBA (A68-A112).

On September 9, 1991, before Star Market had even been served notice of the company bias election protest, the Teamster Election Officer notified Star Market of his final decision on the merits of this second protest (A128). In overturning the Arbitration result, the Election Officer also closed the evidentiary record. While purporting to rely on the Arbitration's record evidence, the Teamster Election Officer based his decision on evidence only before him, and specifically on three items of evidence never confronted by Star Market during the Arbitration hearing. To date, this "evidence" has never even been seen by Star Market, although Star Market has repeatedly asked to see it (A212, 221). For example, the Teamster Election Officer relied upon a post-arbitration company memo and the inferences he drew from that memo. Also, the Teamster Election Officer relied upon statements by two persons – one who never testified during the Arbitration and a second who testified but whose "evidence", at least as set forth in the September 9th decision, was different from that in the Arbitration.

When Star Market sought review to the Teamster Independent Administrator (also appointed under the Consent Decree), the decision of the Teamster Election Officer announced that, "absent extraordinary circumstance," no evidence, which had not been submitted to him in his decision-making process, could be relied upon in appeal to the Teamster Independent Administrator (A137). In short, Star Market was locked into an evidentiary record, prepared *ex parte* by a court-appointed Teamster, having the same effect as if Star Market had defaulted judgment. Having had no notice of continuing, active charges against it (as opposed to the moot Teamster bias election protest), Star Market had had no reason to submit evidence to the Teamster Election Officer and never again was Star Market given the chance to do so.

The Teamster Independent Administrator affirmed the Teamster Election Officer's decision (A138), ignoring the due process issues raised by Star Market relating to the company bias election protest. Indeed, the court-appointed Teamsters have categorically refused, even to this date, to show the contents of the Teamster Election Officer's file and the alleged "evidence" against Star Market (A217). Citing to the "extraordinary circumstances" of denial of due process, Star Market continued to challenge the Teamster Independent Administrator's affirmance and the right of the court-appointed Teamsters[2] to order Star Market to act in matters regulated by collective bargaining. While the Consent

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2. Paragraph 12(B)(ii) of the Consent Decree that defines the powers of the Court Appointed Officers and provides that the Independent Administrator shall have the power to void contracts which he reasonably believes constitute or further an act of racketeering activity or furthers or contributes to the association directly or indirectly, of the IBT or any of its members with the [La Cosa Nostra] or elements thereof. However, the Indpendent Administrator's powers do not extend to collective bargaining agreements (A46).

Decree provided for the Teamster Independent Administrator to make any application to the District Court which he deemed warranted (A52), the Teamster Independent Administrator instead called upon the United States Attorney to institute contempt proceedings against Petitioner (A216).

On October 24, 1991, the United States Attorney requested the District Court (A147) that Star Market should be held in Contempt for its refusal to "obey" the Election Officer's final decision. Only then, for the first time, did Star Market learn of the existence of Henderson's "company bias" election protest – when the United States Attorney attached it to the proposed Contempt Order. Thus, when Star Market appeared before the District Court on October 28, 1991, for the hearing on the Contempt motion, it had just learned of the allegations made against it by Henderson to the Teamster Election Officer in May of 1991.

During argument before the District Court, Star Market sought again to introduce evidence of its "lack of notice" and to respond to the Teamster Election Officer's ex parte evidentiary record (A191). The District Court denied this evidentiary request as "off the wall." The transcribed argument is reproduced in the Appendix, beginning at A161. In addition, the District Court also evidenced a clear bias against all employers that had labor relations with the IBT, even through only one Local of the IBT as was Star Market's case. *Sua sponte,* the District Court opined that an "alliance" existed apparently between all employers and the old guard of the IBT (A174-A175). No record evidence to demonstrate such "alliance", or that Star Market had any part in it, exists.

Similarly, there had been no allegation or evidence that the discharge of Henderson was undertaken to promote any political position of the IBT, any racketeering activity or the presence of La Cosa Nostra in the IBT. Significantly, the Teamster Election Officer found, after reviewing the record of the Arbitration and all *ex parte*

evidence presented only to him, that Henderson's Local Union representatives had *properly represented* Henderson in the Arbitration (A114).

The Second Circuit affirmed the District Court, finding that the court-appointed Teamsters were "private parties" and the resultant lack of state action precluded due process violations, that Star Market had "waived" its rights to raise due process violations by not following the Consent Decree-created "appeal procedure," that the procedure followed by the court-appointed Teamsters satisified the norms of due process, and further holding that the Consent Decree and the issues arising under or from it were too complex to be adjudicated competently in arbitration.

REASONS FOR GRANTING THE WRIT

1. THE ORDER OF THE DISTRICT COURT IMPOSING PENALTIES OF CONTEMPT ON STAR MARKET WAS ISSUED WITHOUT DUE PROCESS, RENDERING IT A LEGAL NULLITY. STAR MARKET HAS WAIVED NONE OF ITS RIGHTS AT STAKE IN THIS APPEAL.

As soon as men decide that all means are permitted to fight an evil, then their good becomes indistinguishable from the evil that they set out to destroy.

The Judgement of the Nations,
Christopher Dawson

In finding that Star Market had waived its right to contest the denial of due process in the company bias election protest by not exhausting procedures established by the Consent Decree, the Court of Appeals failed to recall the early dictates of this Court, warning of the effects of denial of due process to any citizen, under any circumstances. The Court of Appeals was naturally interested to insure that the Consent Decree procedures, negotiated by the United States and approved by the District Court, succeeded in ridding the IBT of La Cosa

Nostra influence — a just end indeed. However, just and honorable ends cannot excuse the most unworthy and despicable of means.

The decision of the Teamster Independent Administrator, affirming the Teamster Election Officer's September 9th decision, served in effect as a default judgment, taken without notice or opportunity for Star Market to be heard. The October 29th Order of the District Court was based upon that defective order and, under the longstanding law of this Court, is a nullity. Similarly, Star Market had undertaken all legal steps which it was required to take as an employer, not party to the Consent Decree, in perfecting its appeal.

At the time when the United States Attorney sought the Contempt Order, Star Market had already been denied notice of the nature of the proceeding against it — the company bias election protest — and the benefits of such notice. It had already been denied the right to confront witnesses and evidence alleged against it or to submit evidence in its behalf. As an uninvolved employer, it had already been forced into a hostile forum and made to submit to the decision making of a Teamster, albeit a court-appointed Teamster, loyal to the opposing party in the dispute. The District Court ruled that Star Market would not be allowed to challenge these defects by offering evidence to preserve a record to support its claims of denial of due process.

By any meaningful evaluation, Star Market was treated as though it was in some kind complete and inexcusable "default" of response to Henderson's company bias election protest, although it had never received notice of the charges against it. In researching for this Petition, it was difficult to find in all the annals of judicial history a case with as bizarre a procedural history as this one. However, long ago, in an equally righteous effort to end an evil — then, the Civil War — this Court specifically condemned as "sham" the kind of

hearing offered Star Market here. In *Windsor v. McVeigh,* 93 U.S. 274 (1876), an officeholder of the Confederate States, then living behind rebel lines, was given notice of forfeiture proceedings against his property to which he responded through counsel. His appearance and answer were struck and the forfeiture order entered. Upon review, this Court reversed that forfeiture, noting as follows:

> This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court, pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect of any other tribunal. 93 U.S. at 277.

Such a proceeding was likened by the Court to a "sham and deceptive proceeding." 93 U.S. at 278. *See also, Hovey v. Elliott,* 167 U.S. 409 (1897) (citing *Windsor, supra.) Cf., Hansberry v. Lee,* 311 U.S. 32 (1940) (reversal of res judicata effect of state judgment as a denial of procedural due process, since the parties in the action which occasioned the judgment were not parties, nor in privity with the parties, to the prior suit, nor represented in that earlier litigation.)

By being denied notice, Star Market was effectively placed in a position indistinguishable from "default", denied opportunity to challenge meaningfully the decision of the Teamster Election Officer. This Teamster Election Officer decision served as the sole basis for the District Court's "factual" findings in support of its Contempt order. Star Market was never given an opportunity to confront the Teamster Election Officer's witnesses or any documents upon which he relied. Ultimately, the burden of proving notice must fall on the joint venture of the United States Attorney and the court-appointed

Teamsters. *F.R.Civ.P. 4(c) and 4(g).*[3] They have failed to do so. Absent that notice, all else afterwards falls. Simply stated, Star Market was perfunctorily summoned to a court only to be denied its due process rights, a practice condemned by this Court for more than a century.

2. THE PETITION SHOULD BE GRANTED TO CORRECT THE DENIAL OF DUE PROCESS BY ACTIONS OF COURT-APPOINTED TEAMSTERS, THE UNITED STATES ATTORNEY AND THE DISTRICT COURT, ALL OF WHICH SERVED TO DEPRIVE STAR MARKET OF ITS CONSTITUTIONAL RIGHT TO FAIR AND IMPARTIAL HEARING UPON ADEQUATE NOTICE.

A. The United States Attorney and the Court-Appointed Teamsters Acted Jointly So As To Place Any Private Action Under The Color Of Law And Subject To Due Process.

The IBT litigation has spawned decisions of the Second Circuit which have held that the court-appointed Teamsters are "private actors" and not obliged to meet "due process" standards in their actions.[4] In dealing with Star Market's due process claims, the Second Circuit failed to accord sufficient weight to the lockstep joint action of the United States

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3. Unlike *Hicklin v. Edwards,* 226 F.2d 410 (8th Cir. 1955), where defendant in default sought to reopen judgment based on alleged lack of notice in the face of a United States Marshall's return of service, imposing on defendant a burden of strong and convincing evidence, the United States Attorney has never proved a return of service to establish Star Market received the company bias election protest any earlier that October 24, 1991. Thus, having made the allegation of non-service and attempted to introduce evidence of that fact, Star Market has no further evidentiary burdens on this point. Indeed, were it otherwise, Star Market would left the impossible burden of proof of a negative fact, i.e., proving that service did not happen.

4. *See, e.g., U.S. v. I.B.T. et al. (Dominic Senese and Joseph Talerico),* 941 F.2d 1292 (2nd Cir. 1991).

Attorney, as plaintiff's counsel, and the court-appointed Teamsters. Private action under the color of law has long been held by this Court to impose due process standards – when private actors perform a public function. This concept was first articulated in *Smith v. Allwright,* 321 U.S. 649 (1944). In *Smith,* faced with allegations that the Democratic Party refused to admit blacks, the Court found that the Texas election system made party primary elections an integral part of the overall election scheme, placed initial management of primaries under the political parties and, in subjecting election management to scrutiny, found that the parties performed a state function. *See also, Sniadach v. Family Finance Corp.,* 395 U.S. 337 (1969); *Lugar v. Edmonson Oil Company,* 457 U.S. 922 (1982).

The United States Attorney's Office and the court-appointed Teamsters acted jointly and in concert to deny Star Market any meaningful due process. While acting in a quasi-judicial role, the Teamster Election Officer failed to give notice to Star Market, causing it to become locked into an unconfronted and undisclosed record. In doing so, the Teamster Election Officer was acting to advance rights of the Teamster protestant which belied any claimed impartiality in his quasi-judicial role. By moving for a Contempt Order to enforce these rights, the United States Attorney joined with the court-appointed Teamsters and adopted their failure of notice to their mutual benefit and Star Market's detriment. In *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), in striking down a "No Blacks" restriction by a restaurant operating in space leased to it by the state, the Court looked to the interdependence of the actors and found it to be so close as to be regarded a "joint venture." Here, the commitment of the United States Attorney and the court-appointed Teamsters to achieve their mutually desired remedies was much closer – a truly tandem operation.

The Consent Decree was the end product of the federal government's racketeering action against the

IBT and its La Cosa Nostra influence. The United States Attorney relied upon the court-appointed Teamsters to implement remedial steps which it had created in negotiations with the IBT. Throughout the case, the court-appointed Teamsters relied upon and sought immediate assistance of the United States Attorney's Office and the District Court to enforce their orders. The lockstep interplay of conduct between the federal officers, both Executive and Judicial, and these court-appointed Teamsters belies any attempt to assert a claim of private action. Much as in *Burton,* the United States and the court-appointed Teamsters have been engaged in a joint venture, through the power of the District Court, to restructure the IBT from the grass roots level upwards.

B. THE JOINT DENIAL BY THE UNITED STATES ATTORNEY AND THE COURT-APPOINTED TEAMSTERS OF NOTICE, CONFRONTATION OF EVIDENCE AND IMPARTIAL HEARING VIOLATED STAR MARKET'S RIGHT TO DUE PROCESS.

While the right to due process is absolute, what constitutes due process varies in different factual situations. *Matthews v. Eldridge,* 424 U.S. 319 (1976). Over time, the Court has defined the minimum requirements of due process in a number of opinions which can be briefly summarized as: 1) adequate notice, *Goss v. Lopez,* 419 U.S. 565 (1975); 2) adequate opportunity for a hearing, *Armstrong v. Manzo,* 380 U.S. 545 (1965); the right to introduce evidence, *Baltimore & Ohio Railroad v. United States,* 298 U.S. 349 (1936); and the right to confront and cross-examine witnesses, *Wolff v. McDonnell,* 418 U.S. 539 (1974). In addition, due process requires that the proceedings occur before an impartial decision maker. *Schweiker v. McClure,* 456 U.S. 188 (1982); *Fuentes v. Shevin,* 407 U.S. 67 (1972).

Star Market was denied notice of the company bias election protest from May 10th until after the Teamster Election Officer had ruled, ordering Star Market to reinstate Henderson. Star Market's first notice of the

actual existence of any basis for continued Teamster Election Officer proceedings against it came in the Contempt proceeding itself. By then, the evidentiary door was closed. There had never been an opportunity for Star Market to introduce evidence on its behalf to dispel the Teamster Election Officer's self-serving finding of "pretext" in a routine Star Market memo, nor had Star ever confronted the evidence relied upon by the Teamster Election Officer in reaching his decision.

Further, Star Market was denied an impartial decision maker by this process. The Teamster Election Officer and Independent Administrator serve as employees of the IBT and as appointees of the District Court. The Teamster Independent Administrator functioned almost with the combined power of the General President and General Executive Board of the IBT. Both court-appointed Teamsters were charged with protecting the internal IBT rights of Teamsters -not with being "impartial" to employers. Star Market had never agreed or bargained for such decision makers, i.e., Teamsters.

The Teamster litigation has come largely to a close but this matter stands as a startling precedent and blueprint for future abuse. Can the United States annoint its "private parties" to act on its behalf through any Consent Decree, cause them to make quasi- judicial determinations without any pretense at due process and then bootstrap the result of this sham private action by non- evidentiary, summary Contempt proceedings to accomplish the ends desired by the federal government when it began the program? Perhaps, the abuses set forth were no more that the inadvertent consequences of the United States' zeal to rid the IBT of organized crime. Still, they have served to deny Star Market of its day in court and violated its rights under the Constitution and federal law. In retrospect, these procedures were far more "sham" than that which was condemned in *Windsor v. McVeigh, supra.*

3. THE PETITION SHOULD BE GRANTED TO CORRECT THE WHOLESALE SPLINTERING OF WELL-ESTABLISHED FEDERAL LABOR LAW PRECEDENTS.

A. THE COURT-APPOINTED TEAMSTERS AND THE DISTRICT COURT WERE DENIED SUBJECT MATTER JURISDICTION OVER STAR MARKET ON THIS PRECISE ISSUE BY THE NATIONAL LABOR RELATIONS ACT.

Unless otherwise provided by statute or a judicially recognized exception, this Court has long held that the NLRB has exclusive jurisdiction to remedy claims arguably within the scope of sections 7 and 8 of the National Labor Relations Act, 29 U.S.C. §157 and 158 ("Act"). *San Diego Building Trades Council v. Garmon,* 359 U.S. 236 (1959); *National Licorice Co. v. NLRB,* 309 U.S. 350 (1940). Section 7 of the Act guarantees the rights of employees to organize or join labor organizations, to select agents for of collective bargaining, and to otherwise act concertedly for mutual aid and protection. Section 8 of the Act reinforces these rights by enumerating unfair labor practices which unlawfully infringe on them.

If proved, the conduct complained of by Henderson in the identical grievance and the second election protest — alleging company bias based on his intra union activities would be an unfair labor practice. Allegations of employer interference or retaliation in union election activities traditionally have been resolved by the NLRB, pursuant to the Court's exclusivity rulings. *See, e.g., A.P.F. Electronics, Inc.,* 257 NLRB 488 (1981). Indeed, Henderson actually filed just such a Charge with the NLRB on these precise facts, which Charge is still pending at this time. The effect of the Teamster Election Officer's decision and the District Court's Contempt Order was to adjudicate Henderson's Unfair Labor Practice Charge outside the NLRB process. When their

decisions are considered in comparison with the pending NLRB proceeding, the full splintering consequences of their actions become apparent.

Is the NLRB now precluded by the District Court's decision from finding other than that Henderson was the victim of an unfair labor practice – discrimination based on his union activities? Is the NLRB permitted different factual findings from the Election Officer's "findings" in considering Henderson's charges? Soon, the NLRB may have conducted evidentiary hearings giving Star Market its day in court to confront the former *ex parte* evidence, if such "evidence" is even admissible. If the NLRB then determines on the full and confronted record that Henderson was properly discharged, Star Market will be denied the benefit of the NLRB award by the District Court's Order. The effect of the District Court's Order is thus to preempt the NLRB's discretion and render any result that varies from the District Court a nullity. To even pose these legal dilemmas makes it very clear why the *Garmon* case was decided as it was by this Court.

B. THE ELECTION OFFICER'S DECISION DISRUPTS WELL ESTABLISHED FEDERAL LABOR LAW UNDER SECTION 301 OF THE LABOR-MANAGEMENT RELATIONS ACT BY CREATING CONFLICTING AND INCONSISTENT REMEDIES FROM COLLECTIVELY BARGAINED ARBITRATION.

In similar vein to this Court's deference to NLRB expertise in protective/prohibited cases, Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §185, has also earned this Court's broad and unwaivering support for the preemptive effect of arbitration. The Court has routinely held that individuals seeking to challenge an allegedly defective arbitration award must avail themselves of the exclusive remedies of Section 301. *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985); *Smith v. Evening News Asso.*, 371 U.S. 195 (1962); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95

(1962); *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962). The NLRB itself defers to arbitration so long as the claim is factually parallel and the arbitrator had the evidence before him. *Olin Corporation,* 228 N.L.R.B. 88 (1987).[5]

Historically, the Court has defended, against repeated attacks by both the federal and state judiciaries, the value of labor arbitration and has sought to protect it as a vital mechanism for labor peace. *United Steelworkers of America v. American Mfg. Co.,* 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960). Moreover, even the past caution of the Court in weighing arbitration as a "comparable forum" for the vindication of competing legal rights, originally expressed in *Barrentine v. Arkansas Best Freight Systems,* 450 U.S. 728 (1981) and *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974), has recently been reconsidered and rejected in *Gilmer v. Interstate/Johnson Lane Corp.,* ____U.S. ____, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

In *Gilmer,* the Court re-endorsed the value of arbitration as a prompt, cost-effective means of dispute resolution that competently dealt with the due process rights of all parties. Since *Gilmer,* the federal courts have begun to expand arbitration as a compulsory means of dispute resolution. *See, e.g., Mago v. Shearson Lehman Hutton,* 1992 U.S. App. LEXIS 1694 (9th Cir. 1992); *Dancu v. Coopers & Lybrand,* 778 F.Supp. 832 (E.D.Pa.

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5. By the court-appointed Teamsters' admission, no basis exists for suit under section 301 of the LMRA. The Teamster Election officer concedes that Henderson was fairly represented by the IBT. Where the collective bargaining agreement contains exclusive and final procedures for the resolution of employee grievances, an employee will be prohibited from bringing an action under section 301 absent an allegation that his union breached its duty of fair representation. *Alford v. General Motors Corp.,* 926 F.2d 528 (6th Cir. 19919), citing *Vaca v. Sipes, supra* at Note 1.

1991). The *Gilmer* holding is best seen as a reinforcement of this Court's original reluctance to disturb arbitration results, except for certain limited areas expressly created by Congress. In *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), this court held:

> As long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed a serious error does not suffice to overturn his decision. 484 U.S. at 38.

Here, the Second Circuit has rejected *en toto* this historically approved value of labor arbitration in the context of this Consent Decree, claiming that the Decree was too complex to be allowed to go to arbitration. In doing so, the Second Circuit was consistent with its decision in *United States of America v. International Brotherhood of Teamsters et al. (Yellow Freight)*, 948 F.2d 98 (1991), where it decided that the NLRB was "too glacial" to be permitted to hear those matters which ordinarily would fall within its exclusive jurisdiction.[6] While there may have been some short term, "end justifies the means" logic to this analysis in *Yellow Freight,* there is none here. The bargained-for arbitration process at Star Market has been emasculated, totally and without redemption unless this Court acts to remedy this injury.

This judicial activism fails to recognize the necessary restraints imposed upon the courts below by the

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6. Historically, this court has declined to give weight to complaints of NLRB delay as a basis to deprive the agency of jurisdiction. *Cf. Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776 (A.F.L.) et al.*, 346 U.S. 485 (1953) (Noting and failing to follow the dissenting opinion of the Pennsylvania Supreme Court which considered the NLRB to be an inadequate federal remedy because of its slow administrative processes and which would have sustained a state court injunction barring further action by the NLRB.)

nature of the proceedings before them. The government's litigation against the IBT was brought under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §1961 *et seq.*, with the intent to drive organized crime influence from the hierarchy of the International levels of the IBT. It was not originally focused, nor was there any point throughout the original proceedings, that the focus was changed to aim at collective bargaining relationships, especially relationships between individual locals of the IBT and the employers with which these locals bargain. Nor was the litigation ever intended to right every alleged wrong under every Teamster contract in the United States.

In *Presley v. Etowah County Commission et al.*, U.S. ____, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992), the Court rejected an attempt by the United States Justice Department to create expanded forms of relief for black county commissioners whose responsibilities had been reduced by subsequent changes in the political structure. The Justice Department sought to enlarge the scope of a consent decree originally arising under the Voting Rights Act, 42 U.S.C. §1973c. In *Presley,* the Justice Department sought to have the Court defer to its expertise in voting rights matters and allow it to fashion social remedies it thought best. This Court rejected that attempt at federal expansionism and, while endorsing the concept of liberalism of remedy within the constraints of the Act, declined to extend construction beyond the Voting Rights Acts' purview.

In effect, the rejection of both impartial Arbitration and the NLRB as the only legal resolution mechanisms for Henderson's claims is a bold attempt to expand the powers of the federal government as embodied in the United States Attorney, acting through the court-appointed Teamsters under the Consent Decree. In his decision, the Teamster Election Officer cited the body of NLRB law represented by *Olin Corporation, supra,* which allows the NLRB to decline to defer to arbitration when not all relevant issues had been presented to the

arbitrator. Here, the issue of company bias against Henderson was presented to the Arbitrator, as was Henderson's evidence in support of his claim. It is instructive that the evidence which the Teamster Election Officer cited as not being before the Arbitrator, thus justifying his refusal not to defer to the arbitration, was the same *ex parte* evidence which he had failed to disclose to Star Market until his September 9th order.

The government has suggested that the Consent Decree itself created some new bundle of rights to the benefit of Henderson which stand independent of those created by Congress under existing federal labor law. In *Presley, supra,* the Court made clear that a consent decree finds its limits in the statute upon which the decree's underlying litigation was based. Any claim of expanded rights must necessarily arise from the government's choice to base its suit against the internal workings of the IBT under RICO. However, under the *Presley* analysis, Star Market would have been entitled to a trial by jury under RICO, if the results of the arbitration were being attacked. Simply put, the United States Attorney's course of conduct, implemented by the Court Appointed Officers, operates much as did the Justice Department's conduct in *Presley,* to create inappropriate avenues to relief otherwise unavailable under federal law – in the process depriving Star Market of its day in court.

It would certainly be ironic if the joint action of the United States Attorney and the court-appointed Teamsters were able to deprive Star Market of its fair day in court – all under the banner of ridding the IBT of gangsterism. In doing so, their action abdicates almost every principle of federal labor law developed by this Court over the last 40 years and reverses the Court's clear mandates in *Presley* and *Gilmer*. It would be doubly ironic in that there is not one scintilla of evidence that racketeering or organized crime influence had anything to do with Henderson's discharge. The uncontroverted evidence after a full and fair hearing, at which

Henderson was properly represented by his Local Union, was that Henderson was simply dishonest in his dealings with his employer – stealing time for which he was being paid.

CONCLUSION

Neither the good intentions of the United States Attorney and the District Court or the exemplary nature of the ends achieved in cleaning up the IBT, no matter how resoundingly they may be recited by the government in opposing this Petition, justify the arbitrary and legally violative means used in this case. They have sought to expand improperly the limited scope of the remedies legitimately achieved in litigation with the IBT. Unless corrected by this Court, the judicially-approved conduct of the federal government, by and through its anointed private actors, serves as a terrifying blueprint for the future. Creation of nominally "private persons", whose true function is to allow the federal government to ignore the private rights of citizens, which it otherwise must honor, to pursue essentially social goals which it deems desirable, is wrong. The government's course of conduct in this matter, as it was in *Presley,* is proof that future abuse is likely. The danger is real that such a blueprint will live long after the IBT litigation has become a fascinating but closed chapter in American labor history.

Moreover, it is imperative that the Court act to reaffirm, protect and preserve the coherent, integrated and valued scheme of rights and remedies embodied in the federal labor law. This Court should take the opportunity that this Petition offers to reassert the value of labor arbitration and NLRB preemption, along with the sound principles of judicial economy that underlie the longstanding concepts of deferral endorsed by this Court. Petitioner therefore respectfully suggests that it is urgent that the Court speak to these issues and grant its

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: April 21, 1992

91-1674

FILED
APR 22 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA,
Respondent,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA;

[Defendants continue on overleaf]

STAR MARKET COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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[Defendants cont'd from front cover]

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Defendants.

SECTIONS 7 and 8 of the National Labor Management Relations Act, 29 U.S.C. §157 and 158, provide:

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other manual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

§ 158. Unfair labor practices.

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization of contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by

any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

SECTION 301 of the Labor Management Relations Act, 29 U.S.C. §185, provides:

§ 185. Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having

jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting the commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Racketeering Influenced and Corrupt Organizations Act, 29 U.S.C. §1961, 1962 and 1964 provide in pertinent part,

§ 1961. Definitions

As used in this chapter [18 USCS §§ 1961 et seq.]–

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 1951 (relating to interference with commerce, robbery, or extortion),

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, an acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Added Oct. 15, 1970, P.L. 91-452, Title IX, § 901(a), 84 Stat. 942; Nov. 18, 1988, P. L. 100-690, Title VII, Subtitle B, § 7033, 102 Stat. 4398.)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect the interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders

or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [18 USCS §§ 1961 et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 797—August Term, 1991
(Argued: November 27, 1991
Decided: January 22, 1992)
Docket No. 91-6270

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA; ANTHONY SALERNO, also known as Fat Tony; MATTHEW IANNIELLO, also known as Matty the Horse; ANTHONY PROVENZANO, also known as Tony Pro; NUNZIO PROVENZANO, also known as Nunzi Pro; ANTHONY CORALLO, also known as Tony Ducks; SALVATORE SANTORO; CHRISTOPHER FURNARI, SR., also known as Christie Tick; FRANK MANZO; CARMINE PERSICO, also known as Junior, also known as The Snake; GENNARO LANGELLA, also known as Gerry Lang; PHILIP RASTELLI, also known as Rusty; NICHOLAS MARANGELLO, also known as Nicky Glasses; JOSEPH MASSINO, also known as Joey Messina; ANTHONY FICAROTTA, also known as Figgy; EUGENE BOFFA, SR.; FRANCIS SHEERAN; MILTON ROCKMAN, also known as Maishe; JOHN TRONOLONE, also known as Peanuts; JOSEPH JOHN AIUPPA, also known as Joey O'Brien, also known as Joe Doves, also known as Joey Aiuppa; JOHN PHILLIP CERONE, also known as Jackie the Lackie, also known as Jackie Cerone; JOSEPH LOMBARDO, also known as Joey the Clown; ANGELO LAPIETRA, also known as Nutcracker; FRANK BALISTRIERI, also known as Mr. B.; CARL ANGELO DELUNA, also known as Toughy; CARL

CIVELLA, also known as Corky; ANTHONY THOMAS CIVELLA, also known as Tony Ripe; GENERAL EXECUTIVE BOARD, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; JACKIE PRESSER, General President; WELDON MATHIS, General Secretary-Treasurer JOSEPH TREROTOLA, also known as Joe T, First Vice President; ROBERT HOLMES, SR., Second Vice President; WILLIAM J. MCCARTHY, Third Vice President; JOSEPH W. MORGAN, Fourth Vice President; EDWARD M. LAWSON, Fifth Vice President; ARNOLD WEINMEISTER, Sixth Vice President; JOHN H. CLEVELAND, Seventh Vice President; MAURICE R. SCHURR, Eighth Vice President; DONALD PETERS, Ninth Vice President; WALTER J. SHEA, Tenth Vice President; HAROLD FRIEDMAN, Eleventh Vice President, JACK D. COX, Twelfth Vice President; DON L. WEST, Thirteenth Vice President; MICHAEL J. RILEY, Fourteenth Vice President; THEDORE COZZA, Fifteenth Vice President; DANIEL LIGUROTIS, Sixteenth Vice President; SALVATORE PROVENZANO, also known as Sammy Pro, Former Vice President,

Defendants,

STAR MARKET COMPANY,

Appellant.

Before:

TIMBERS, PIERCE and WALKER,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, David N. Edelstein, *Judge,* entered on October 29, 1991, enforcing a determination of the Independent Administrator under a certain consent decree relating to the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, ordering an employee of the Star Market Company to be reinstated with back pay.

Affirmed.

ROBERT J. BRAY, JR., Blue Bell, Pennsylvania (Henry F. Siedzikowski, Elliot Bray & Riley, Blue Bell, Pennsylvania, Robert J. Zastrow, Stroock & Stroock & Lavan, New York, New York, of counsel), *for Appellant.*

EDWARD T. FERGUSON, III, Assistant United States Attorney (Otto G. Obermaier, United States Attorney for the Southern District of New York, Richard W. Mark, Assistant United States Attorney, of counsel), New York, New York, *for Appellee.*

WALKER, *Circuit Judge:*

Star Market Company (Star Market) appeals from an order of the United States District Court for the Southern District of New York, David N. Edelstein, *Judge,* entered on October 29, 1991. That order directed Star Market to comply with the decision of an Independent Administrator, itself affirming the decision of an Election Officer, both officers having been appointed pursuant to a consent decree (Consent Decree) relating to the affairs of defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (IBT). The order required Star Market to reinstate a union employee whom it had dismissed allegedly for "stealing company time."

Star Market argues that the reinstatement proceedings conducted by the Consent Decree Officers, and enforcement hearing held in the district court, ran afoul of constitutional due process requirements. Star Market further contends that the district court's enforcement of the Officers' reinstatement order effectively reversed a binding arbitration award in violation of federal labor law. Because we find no merit in either argument, we affirm the district court's order in its entirety.

BACKGROUND

This appeal joins the ranks of what has now become a legion of cases arising out of the government's enforcement of the Consent Decree entered into on March 14, 1989 by the United States Government and the IBT. The Consent Decree was a critical part of the settlement of the government's civil RICO action, *see* Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C.A. §§ 1961-1968 (1984 & Supp. 1991), brought in 1988 in an effort to rid the IBT of its domination by organized crime. The Consent Decree instituted sweeping structural reforms of the IBT's electoral and disciplinary processes. Its "central purpose" is to insure "[t]he fair and open conduct of the 1991 IBT election," *U.S. v. IBT (Yellow Freight),* 948 F.2d 98, 100 (2d Cir. 1991) as a means of freeing IBT's General Executive Board from the grip of La Cosa Nostra. The decree authorized the appointment of three court officers to oversee certain aspects of the IBT's affairs: an Election Officer (EO), an Investigations Officer, and an Independent Administrator (IA). The officials' particular functions have been discussed in previous opinions of this Court and will not be elaborated upon here. *See generally, United States v. IBT,* 905 F.2d 610, 613 (2d Cir. 1990). It suffices to state that they have been charged with implementing the free and fair election of the IBT's governing officials, and that the district court has exclusive jurisdiction to "decide any issues relating to the actions or authority of the [Independent] Administrator." *Id.*

The facts relevant to our review of the present controversy are largely set forth in the district court's opinion and order in *United States v. IBT,* 776 F. Supp. 144 (S.D.N.Y. 1991). We need only summarize them here. Other facts are ascertainable from the record on appeal, including letters between the parties, the decisions of the labor arbitrator, the EO and the IA.

On May 13, 1991, Star Market terminated Neal J. Henderson, a union steward, from his employment with the company. At the time he was fired, Henderson had been employed by the Star Market supermarket chain for fourteen years, and was working as a warehouseman in the perishables department of one of the company's Boston-area facilities. Star Market's stated reason for terminating Henderson was that, on May 2, Henderson had "stolen company time" by leaving his assigned facility before his pre-shift overtime period had ended. Henderson admits leaving his post 25 minutes early on May 2 in order to purchase cold medicine and something to eat, as well as to conduct some union business before beginning his next shift. He argues, however, that it was common practice for Star Market employees who were working pre-shift overtime to take an early break if their work was complete.

Henderson claims that the true reason for his termination was to retaliate against him for his union election activities. In the most recent election held by his Teamster local, IBT Local 25 (Local 25), Henderson had opposed the slate of powerful incumbents, successfully campaigned for an insurgent slate of candidates, and was himself elected as a Local 25 delegate to the International Union convention. In response to these activities, Star Market supervisors made disparaging comments to Henderson regarding his candidacy for delegate, as well as his support for the opposition slate. Henderson contends that Star Market's negative reaction to his involvement in union politics culminated in his being fired.

After being dismissed from his job, Henderson filed a grievance pursuant to the collective bargaining agreement (CBA) between Local 25 and Star Market, claiming, *inter alia,* that his discharge was politically motivated. He also filed a protest with the EO alleging that the retaliatory nature of his dismissal violated the Election Rules promulgated under the Consent Decree. The EO deferred decision on Henderson's protest until the

contractual grievance process had culminated in a decision, but notified the parties that his investigation would proceed. The EO also advised the parties that he would not be bound by any decision reached in the grievance proceedings conducted pursuant to the CBA.

The CBA's grievance procedure provided for a two-step review. The first step consisted of a joint grievance panel comprised equally of union and employer panelists. If the panel was unable to reach a consensus, the second step was for the grievance to be submitted to binding arbitration before an independent arbitrator. Henderson advised the EO of his concern that he would not receive fair treatment from the grievance panel because a powerful incumbent union official, opposed by Henderson, controlled the selection of the union panelists. The EO advised Star Market of Henderson's concern and noted that the EO's review of the Election Rule protest would also include a review of the grievance process itself and the union's representation of Henderson in that process.

On May 22, 1991, the joint grievance panel deadlocked on Henderson's grievance, and the matter went to arbitration. On June 12, 1991, an arbitrator held a hearing on Henderson's grievance. On June 17, relying exclusively upon the provision of the CBA entitled, "Breaks and Free Time," the arbitrator found Henderson's discharge to be justified. Although Henderson argued that he was a victim of retaliation, the arbitrator did not address the issue.

Thereafter, the EO completed his own investigation of Henderson's protest. The investigation revealed that Star Market's dismissal of Henderson was a disproportionately severe sanction as compared to those imposed for similar offenses by other employees. Other shift-break infractions of an equal magnitude had resulted in company discipline ranging from no sanctions whatsoever to verbal warnings. Indeed, in one case where an employee became verbally abusive to a supervisor and ultimately assaulted the supervisor with a billiard ball

after the supervisor found him playing pool on company time, the employee was only suspended for twenty days.

The EO also considered a Star Market employee notice that had been posted after Henderson's arbitration hearing. This notice stated "that certain shifts are somehow unsure of the times they are to go to break," and went on to clarify the company's break-time policy. The notice also advised employees that the rules set out with respect to shift-break time would not go into effect until June 30, 1991 since "there are a couple of changes." Coming, as it did, on the heels of the Henderson arbitration, this notice virtually conceded the company's prior non-enforcement of the contract provision used to justify Henderson's termination. In light of this evidence, the EO concluded that Star Market had retaliated against Henderson for engaging in Union Election campaign activity, which is protected by the Election Rules, and ordered Star Market to reinstate Henderson with back pay and full benefits.

As provided for in the Election Rules, Star Market appealed the EO's decision to the IA. On September 16, 1991, the IA conducted a hearing by telephone—a procedure consented to by Star Market—and accepted a written submission from Star Market which contained legal arguments concerning jurisdiction, deference to the arbitrator and due process. On September 18, 1991, the IA issued a written decision affirming the EO's decision in all respects.

Star Market did not appeal the IA's decision to the district court and steadfastly refused to comply with the IA's direction to reinstate Henderson. On October 24, 1991, at the EO's and IA's request, the government brought an Order to Show Cause in the district court directing Star Market to demonstrate why the court should not, *inter alia,* affirm the IA's decision and direct Star Market to fully comply within 24 hours or be in civil contempt. On October 29, 1991, the district court granted the order and imposed a coercive sanction of $10,000 per day should Star Market fail to comply. Star

Market appealed. After the district court declined to stay its order pending appeal, another panel of this court entered a stay. We now vacate the stay and affirm.

DISCUSSION

I. State Action and Due Process Claims

Star Market argues that the Henderson protest proceedings conducted by the EO, and IA's review and affirmance of the EO's decision, violated Star Market's procedural due process rights under the United States Constitution. More precisely, Star Market contends that it was not a party to the Consent Decree and is not bound by it; that it was denied sufficient notice of the charges lodged against it; that the EO and the IA did not afford it a meaningful opportunity to present evidence and be heard; and that the EO and the IA were not sufficiently impartial to pass constitutional muster. Star Market further argues that these alleged constitutional infirmities infected the enforcement proceedings held in the district court, and therefore the district court's order should be reversed. We are not persuaded by any of these arguments.

As a threshold matter, in order for Star Market to succeed on its due process claim it must establish that the officers appointed pursuant to the Consent Decree were "state actors" in the constitutional sense. *See Blum v. Yaretsky,* 457 U.S. 991, 1002, (1982). This argument was considered and found wanting in a prior *IBT* litigation. In *U.S. v. IBT (Senese),* 941 F.2d 1292, 1295-97 (2d Cir.), *petition for cert. filed,* 60 U.S.L.W. 3379 (U.S. Oct. 10, 1991) (No. 91-717), this Court specifically held that the IA's actions were not state action, and thus were not circumscribed by the provisions of the Federal Constitution. *Senese* arose out of an appeal from disciplinary sanctions imposed upon IBT officials by the IA for violations of the amended IBT Constitution. This Court reasoned that since the IA

acted pursuant to the IBT Constitution, a private charter, and the IA was himself a paid official of the IBT, he was not a state actor. 941 F.2d at 1296.

Star Market argues that even if the Consent Decree officers were not themselves state actors, the district court is an arm of the government, and its enforcement of the IA's decision supplies the requisite state action needed to trigger due process rights. However, in *Senese,* we put this argunnent to rest as well. There we concluded that the district court's affirmance of the IA's disciplinary action did not leave the imprimatur of governmental interference. "[G]overnmental oversight of a private institution does not convert the institution's decisions into those of the State, as long as the decision in question is based on the institution's independent assessment of its own policies and needs." 941 F.2d at 1297. The same reasoning applies equally in this case. There was no state action here, and thus the officers' intervention did not implicate constitutional due process concerns.

In any event, even if state action had been involved, we do not think that Star Market suffered from the deprivation of due process safeguards. In *Yellow Freight,* 948 F.2d at 104, we held that by virtue of the All Writs Act, 28 U.S.C. § 1651(a) (1988), the Consent Decree could be enforced against persons and entities not party to its entry. But we also held that the procedures employed in such enforcement would have to be " 'agreeable to the usages and principles of law.' " *Id.* (quoting the All Writs Act). We then carefully evaluated the procedures for the administrative and judicial review of protests brought pursuant to the Consent Decree Election Rules, and concluded that they "accorded adequate procedural protections to satisfy the All Writs Act." *Id.* at 105. The same procedures were available to Star Market in this case. As the government points out, *Yellow Freight's* conclusion that the procedures satisfied the All Writs Act, "virtually compels the conclusion that those procedures satisfy due process."

Furthermore, Star Market's claim that it was denied procedural due process is belied by the record. In a May 14, 1991 letter to Henderson, Star Market and Local 25, the EO notified Star Market of Henderson's Election Rule protest, supplied it with a copy of Henderson's grievance letter, and solicited any information that Star Market had regarding the matter. In deferring his decision until after the arbitrator rendered his decision, the EO effectively gave Star Market more than three months to prepare and submit its case. After the EO found Star Market to have violated the Election Rules and ordered Henderson's reinstatement with back pay and benefits, Star Market took an appeal to the IA. At the option of the parties, including Star Market which was represented by counsel, the IA conducted a telephone hearing. The IA invited all parties to submit written statements for his consideration and received a submission from Star Market.

Finally, Star Market declined to exercise its right of appeal from the IA to the district court under the Election Rules. Instead it chose to sit back, do nothing and force the government to initiate contempt proceedings in the district court. Star Market's argument that it was not required to be proactive, but rather could disregard the IA's order until judicially required to comply, draws no support from the NLRB cases that it cites. *See e.g. In re the National Labor Relations Board,* 304 U.S. 486, 492 (1938); *NLRB v. P*I*E Nationwide, Inc.,* 894 F.2d 887, 887-90 (7th Cir. 1990). Those cases, which hold that the NLRB's orders are not self-executing, and the underlying statutory law upon which they rely, are unrelated to the procedures at issue here. In this case, Star Market was required to comply with the appellate procedures set out in the Election Rules. The Election Rules provide that a party must obey an order of the IA "unless it is stayed or overturned by the Court." Election Rules, Article XI, § 1(a)(8). Thus, unlike orders of the NLRB, the IA's decisions are self-executing, and by failing to seek a stay or reversal in the

district court, Star Market waived any due process objections that it had with respect to the IA's order to reinstate Henderson. *Cf. N.L.R.B. v. Local 282, International Brotherhood of Teamsters,* 428 F.2d 994, 999 (2d Cir. 1970) (civil contempt proceeding is not an avenue for collateral attack of the underlying order where appropriate procedures for reviewing the order were not attempted).

II. Displacement of the Arbitrator's Decision

Star Market's second argument is more ingenuous than its first. It contends that the district court's enforcement of the IA's decision, which effectively overruled the independent arbitrator's award upholding Henderson's dismissal, contravened long standing federal labor policy favoring arbitration and federal procedures governing judicial review of arbitration awards. *See* Section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185. However, we are not persuaded by Star Market's argumnent.

Certain labor disputes may come under the provisions of a collective bargaining contract as well as within the purview of the Consent Decree. Here, the grievance arbitration conducted pursuant to the CBA, and the parallel Election Rule proceedings held by the EO and IA, reached conflicting results with respect to Henderson's reinstatement. Under these circumstances the question arises as to which determination is controlling.

Star Market points out that the labor contract under which Henderson was employed contained an anti-discrimination provision to protect those employees who engaged in union politics. The Election Rules more specifically sought to insure that union members did not suffer retaliation as a result of disfavored campaign activities related to the 1991 national IBT election. Star Market argues that where the collective bargaining agreement affords protections which encompass rights contained in the Election Rules, the favored status of

binding arbitration under federal labor law preempts related Election Rule enforcement proceedings. We disagree. Rather, we hold that (1) where a consent decree provides individual union members with a source of independent rights as a means of effectuating the consent decree's intended goal, and (2) where the purpose of the consent decree transcends the localized function of particular collective bargaining agreements and, instead, impacts upon the structure and processes of a national parent union, federal policy favoring independent arbitration of labor disputes does not preempt the procedures created to insure the implementation of the consent decree.

Our conclusion draws support from prior holdings of this Court. In *Yellow Freight,* we held that the NLRB did not have sole jurisdiction over an Election Rule protest that also fit the description of an unfair labor practice. The protest concerned an employer's no-solicitation rule barring nonemployee union members from campaigning for union office on the employer's property. "We conclude[d] that the NLRB [did] not have exclusive jurisdiction over the conduct at issue on this appeal, and that the district court and its appointed officers accordingly did not err in addressing it." *Yellow Freight,* 948 F.2d at 106.

Yellow Freight's holding stemmed largely from our desire to "avoid inconsistent interpretations of, and judgments regarding, the Consent Decree, and also to avoid repetitive litigation that would distract the government and the court-appointed officers from implementation of the Consent Decree." *Id.* We have considered the interest in avoiding inconsistent interpretations of the Consent Decree great enough to sustain "an injunction prohibiting all members and affiliates of the IBT from initiating any legal proceeding relating to the Consent Decree 'in any court *or forum* in any jurisdiction' (emphasis added) other than the district court from which this appeal was taken . . . ." *Id.* at 105 (quoting *United States v. IBT,* 907 F.2d 277, 279 (2d Cir. 1990)).

This paramount interest informs our view of the instant controversy. While arbitration pursuant to collective labor agreements may not fall directly within the sweep of the above mentioned injunction, this case demonstrates that it nevertheless can interfere with the Consent Decree's effective implementation. Arbitration cannot be the loophole through which the union and certain employers may avoid the dictates of the Consent Decree and the rules promulgated thereunder. Therefore, we conclude that to the extent an arbitration award is inconsistent with an order implementing the Consent Decree, the Consent Decree order must govern.

Our holding is grounded on the principle that a federal court need not defer to an arbitrator's decision when a plaintiff's labor-related claim stems from a source of legal rights that is separate from, although possibly coextensive with, a collective bargaining agreement. *See McDonald v. City of West Branch,* 466 U.S. 284 (1984) (42 U.S.C. § 1983); *Barrentine v. Arkansas-Best Freight System, Inc.,* 450 U.S. 728 (1981) (Fair Labor Standards Act); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974) (Title VII). Star Market points out that these cases involved independent rights derived from federal statutes, and that a right of action under statutory law reflects a public policy which is not waived by virtue of a labor agreement to arbitrate. Star Market contends that since the Consent Decree is not an act of Congress, it does not have the same overriding force as a statute and cannot be used to displace a binding arbitration provision.

Our review of these decisions, however, shows that they did not simply turn on the statutory nature of the independent rights involved. Rather, these decisions relied as much upon considerations of the limits on both the arbitrator's jurisdictional basis, and the arbitrator's particular realm of competence.

In *Alexander v. Gardner-Denver Co.,* the Supreme Court stated that,

> [a]s the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. *His source of authority is the collective-bargaining agreement,* and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties.

415 U.S. at 53 (emphasis added). *See also Barrentine,* 450 U.S. at 744 ("An arbitrator's power is both derived from, and limited by, the collective bargaining agreement."); *McDonald,* 466 U.S. at 290 (same).

Similarly, the Supreme Court has viewed an arbitrator's professional skill as narrowly circumscribed. While arbitrators are normally well versed in the workings of the industry from which a particular dispute arises, their field of expertise is limited to resolving individual contract disputes which rarely involve broad public interest considerations. Accordingly, "[b]ecause the 'specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land,' . . . many arbitrators may not be conversant with the" issues surrounding the enforcement of the Consent Decree. *Barrentine,* 450 U.S. at 743 (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 581-82 (1960)).

Henderson's Election Rule protest raises both of these considerations. To begin with, whether or not the Consent Decree carried the force of a federal statute, it was undeniably a source of rights separate and distinct from the CBA. These rights were "designed to supplement, rather than supplant" the rights enjoyed by employees under the CBA. *Gardner-Denver Co.,* 415 U.S. at 48. Thus, it is clear that an arbitrator was without jurisdiction to resolve protests arising under the Election Rules, *see Barrentine,* 450 U.S. at 744, even though "certain contractual rights are similar to, or duplicative of, the substantive rights secured by" the Consent Decree. *Gardner-Denver Co.,* 415 U.S. at 54. Moreover, "in instituting an action under [the Consent Decree,

Henderson was] not seeking review of the arbitrator's decision. Rather he [was] asserting a [separate] right independent of the arbitration process." *Id.*

Nor was the EO bound by the arbitrator's factual conclusions. *Cf. McDonald,* 466 U.S. at 292 (arbitration award has no *res judicata* or collateral estoppel effect in subsequent § 1983 action). In a similar context, the Supreme Court has stated that "[t]he arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." *Gardner-Denver Co.,* 415 U.S. at 60 (footnote omitted) (effect of arbitration award on subsequent Title VII litigation). A significant factor in determining the weight to be afforded an arbitration award is whether the "arbitral determination gives full consideration to an employee's" extra-contractual rights, particularly where the issue "is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record." *Id.* at n.21.

Here, the arbitrator's findings, which were before the EO and the IA, omit any mention of Henderson's retaliation claim. Moreover, the arbitrator could not have considered the Star Market employee notice clarifying the company's break-time policy that was posted *after* the Henderson arbitration hearing had ended. This evidence served to corroborate Henderson's retaliation claim. Without the benefit of this information, and given the lack of any findings with respect to Star Market's retaliatory behavior, it is clear to us that the arbitrator's factual inquiry and conclusions were incomplete. Thus, his findings were rightly refused conclusive effect in both the Election Rule protest proceedings and the subsequent enforcement proceedings held in the district court. *Cf. Nevins v. NLRB,* 796 F.2d 14, 18 (2d Cir. 1986) (for NLRB to defer to an arbitration award in a related unfair labor practice dispute the "issues before the arbitrator [must] have been factually parallel to those before the NLRB and the arbitrator [must] have been

presented generally with those facts relevant to disposing of the unfair labor practice charges").

Given the breadth of the undertaking contemplated by the Consent Decree, we believe that arbitrators are not well-suited to grapple with the problem of its enforcement. As has been borne out by the incessant litigation spawned by the government's attempt to enforce the Consent Decree, the Consent Decree has engendered a multiplicity of complex issues that may simply be beyond the "specialized competence" of most arbitrators. In an attempt to rid the IBT of its historic mob domination, an endeavor greatly beneficial to the public interest, the court-appointed officers have been charged with overseeing the organization and execution of a national union election. This has proven to be an arduous task, requiring extensive coordination of nationwide activities. In anticipation of this, the Consent Decree established an entire institutional structure in order to secure its own implementation.

While certain aspects of these Consent Decree cases relate to the "law of the shop," their general import goes far beyond the provisions of any particular labor contract. We do not question the invaluable role that arbitrators serve in aid of smooth labor relations, and nothing we have stated herein should be construed as taking issue with the well established federal policy favoring arbitration of labor contract disputes. However, collective bargaining agreements and the Consent Decree address different problems and serve different purposes. The former governs the daily relations between particular employers and their employees, while the latter is an attempt to rebuild the infrastructure of an entire national labor organization. Considering these different objectives, we think it consistent with federal labor policy that where they differ, collective bargaining agreements yield to the Consent Decree, and that the Consent Decree officers and the district court remain free to complete their task unencumbered by collateral arbitration results. *Cf. Barrentine,* 450 U.S. at 739

(employee's action for wages under the Fair Labor Standards Act (FLSA) was not barred by prior submission of claim to contract grievance procedure since FLSA was designed to achieve specific goals not contemplated by the Labor-Management Relations Act). Therefore, we conclude that protest proceedings arising under the Consent Decree Election Rules are not preempted by binding arbitration.

CONCLUSION

For the reasons stated above, we hold that the district court and its appointed officers afforded Star Market adequate procedural safeguards, and that Henderson's Election Rule protest was not preempted by the arbitration provision in his union collective bargaining agreement. Accordingly, we affirm the district court's order enforcing the IA's decision and vacate the stay thereof.

Judgment affirmed; stay vacated.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,* -v- INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO, et al., *Defendants.*	:	**OPINION & ORDER** 88 CIV. 4486 (DNE)

APPEARANCES:

OTTO OBERMAIER, United States Attorney for the Southern District of New York (Edward T. Ferguson, III, Assistant United States Attorney, of counsel) for the United States of America;

HON. FREDERICK B. LACEY, the Independent Administrator of the International Brotherhood of Teamsters, (Stuart Alderoty, of counsel);

ELLIOT, BRAY & RILEY, Philadelphia, Pennsylvania, (Robert J. Bray, Jr. and Henry F. Siedzikowski, of counsel) for Star Market.

EDELSTEIN, *District Judge:*

This decision arises from the implementation of the rules for the International Brotherhood of Teamsters ("IBT") International Union Delegate and Officer Election (the "Election Rules"), promulgated by the Election Officer and approved as modified by this Court and the Court of Appeals. July 10, 1991 Opinion & Order, 742 F. Supp. 94 (S.D.N.Y. 1990), *aff'd,* 931 F.2d 177 (2d Cir. 1991). The Government brought an Order to Show Cause why this Court should not: (1) affirm the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 – Elec. App. – 187, which affirmed the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG; (2) enter an order directing Star Market, Inc. ("Star Market") to comply fully, within twenty-four hours, with

the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 – Elec. App. – 187; (3) in the event that Star Market fails to comply with this Court's order, adjudge Star Market in civil contempt and impose coercive sanctions, including substantial daily fines of at least $10,000 per day until Star Market complies as directed; and (4) award the Government, the Election Officer and the Independent Administrator such other relief, including attorney's fees, as this Court deems appropriate.

I. BACKGROUND

The Election Officer was appointed by the Court pursuant to its March 14, 1989 Order (the "Consent Decree"), which was agreed to by the plaintiff United States of America (the "Government") and the defendant IBT in settlement of the bulk of this civil racketeering action. The Election Officer is empowered to supervise the implementation of the Consent Decree's electoral provisions, culminating in the first-ever direct rank and file election of IBT International officers. *See* Consent Decree, ¶12 (D) October 18, 1989 Opinion & Order, 723 F. Supp. 203, 206-07 (S.D.N.Y.), *appeal dismissed,* No. 89-6252 (2d Cir. Dec. 13, 1989), *cert. denied,* 110 S. Ct. 2618 (1990). Pursuant to his supervisory authority, the Election Officer promulgated the Election Rules, which were approved as modified by this Court and the Court of Appeals. July 10, 1991 Opinion & Order, 742 F. Supp. 94 (S.D.N.Y. 1990), *aff'd,* , 931 F.2d 177 (2d Cir. 1991). The Election Rules are the linchpin of the Consent Decree's efforts to cleanse the IBT of La Cosa Nostra's corrupt influences. October 18, 1989 Opinion & Order, 723 F. Supp. at 206-07; October 25, 1991 Order, *slip opinion* at 1 (S.D.N.Y. 1991). The Election Rules protect, *inter alia,* the rights of IBT members to participate in union election campaign activities, *see* Art. VIII, §10(a), and enable the Election Officer to respond to violations of the Election Rules, or

any other conduct preventing a fair, honest, and open election, with a wide range of remedial measures. *See* Art. XI, §2.

This matter involves the election protest of Neal J. Henderson, who is a member of IBT Local 25 in Boston, Massachusetts.[1] The principle officer of Local 25 is IBT General President William J. McCarthy. Before his discharge, Henderson had been employed by Star Market since 1977 as a warehouseman in the perishables department of one of its Boston-area facilities. Henderson has been a union steward at Star Market since 1986.

Last spring Henderson was elected as a delegate to the IBT International Union Convention on a slate supporting the candidacy of Ron Carey for IBT General President. Henderson and his slate were opposed by an incumbent-officer slate headed by McCarthy, which supported the candidacy of R.V. Durham for IBT General President.

After winning election as a Local 25 delegate to the International Union Convention, Henderson continued to engage openly, and with Star Market's knowledge, in pro-Carey campaign activities at his place of employment. Star Market's supervisors made disparaging remarks to Henderson about his candidacy for delegate and his other pro-Carey campaign activities.

On May 2, 1991 Henderson and ten other employees accepted a pre-shift overtime assignment that was to

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1. The following account is based on the findings of the Independent Administrator. As set forth more fully below, the findings of the Independent Administrator are entitled to great deference." *United States v. International Brotherhood of Teamsters,* 905 F.2d 610, 616 (2d Cir. 1990), *aff'g,* March 13, 1990 Opinion & Order, 743 F. Supp. 155 (S.D.N.Y. 1990). This Court will overture findings of the Independent Administrator when it determines that they are, on the basis of all the evidence, arbitrary and capricious. *Id.* at 622; *see, e.g.,* October 24, 1991 Opinion & Order, *slip opinion,* at 4-5 (S.D.N.Y. 1991); May 13, 1991 Memorandum & Order, 764 F. Supp. 817, 820-21 (S.D.N.Y. 1991); August 27, 1990 Opinion & Order, 745 F. Supp. 908, 911 (S.D.N.Y 1990).

begin at 7:00 p.m. and end at 9:25 p.m. Henderson's regular shift was to begin at 10:00 p.m. Star Market employees who work pre-shift overtime are entitled to a rest period or break between the end of the overtime period and the start of the regular shift. Employees at Star Market may leave the premises during their rest periods without requesting their supervisors' permission. It was the practice of Star Market employees working pre-shift overtime to leave early for their break if they completed their work.

At about 9:00 p.m., Henderson completed his pre-shift overtime assignment. After checking with his fellow employees whether his services were needed, he left the Star Market facility to buy some cold medicine, get something to eat, and conduct some union business. Upon returning for his regular shift at 10:00 p.m., Star Market supervisory personnel suspended Henderson. On May 13, 1991, Star Market management terminated Henderson because he "stole company time" by leaving the facility before his pre-shift overtime period ended.

Henderson filed a grievance pursuant to the collective bargaining agreement between Local 25 and Star Market. On June 12, 1991, an arbitrator held a hearing on Henderson's grievance. In a decision dated July 17, 1991, that was based solely upon the terms of the collective bargaining agreement, the arbitrator found that Star Market was justified in discharging Henderson and therefore denied his grievance. Henderson also filed a protest under the Election Rules, asserting that his discharge was politically motivated. The Election Officer deferred action on Henderson's protest pending the arbitrator's decision.

Because the arbitrator's decision did not address Henderson's claims of retaliation in violation of the Election Rules, the Election Officer decided to go forward with Henderson's protest. The Election Officer's investigation of the protest revealed that on May 2, 1991, Star Market employees other than Henderson who worked pre-shift overtime in the perishables department

left their work stations before the overtime period ended. Only Henderson, however, was terminated for doing so. The investigation further revealed that the discipline imposed on Henderson was far more severe than that imposed on others who had committed similar infractions.

In his September 9, 1991 decision, the Election Officer found that Star Market had retaliated against Henderson for engaging in Union Election campaign activity that is protected by the Election Rules. Accordingly, the Election Officer directed Star Market to reinstate Henderson to his former position with full seniority, full back pay, and full restoration of all other benefits, and to cease and desist from discriminating against Henderson or any other employee on account of campaign or other activities protected by the Election Rules.

Exercising its rights under the Election Rules, Star Market appealed the Election Officer's September 9, 1991 decision to the Independent Administrator. *See* Election Rules, Art. XI, §1(a) (5). On September 18, 1991, the Independent Administrator issued a decision affirming the Election Officer's decision in all respects. In that decision, the Independent Administrator found that "(g)iven the background here, there can be only one explanation for Star Market's actions. It was retaliating against Mr. Henderson because of his political activity and his support of Carey. The Election Rules simply do not tolerate such action." (Ind. Admin. Dec. at 10.)

Star Market has neither complied with the Independent Administrator's directive to reinstate Henderson, nor has it appealed the Independent Administrator's decision to this Court. Pursuant to Article XI, § l(a) (8), the Independent Administrator's decision "must be followed unless it is stayed or overturned by the Court." In a letter to the Government dated September 26, 1991, counsel for Star Market expressly stated that Star Market would not comply, whereupon the Election Officer

requested that the Government initiate appropriate contempt proceedings against Star Market. By letter dated October 3, 1991, the Government informed Star Market's counsel that unless the company complied with the Election Officer's directives by October 7, the Government would initiate civil contempt proceedings before this Court. By letter dated October 10, 1991, Star Market's counsel informed the Government that the company would not comply.

On October 24, 1991, the Government brought an Order to Show Cause why this Court should not: (1) affirm the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 – Elec. App. – 187, which affirmed the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG; (2) enter an order directing Star Market to comply fully, within twenty-four hours, with the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 – Elec. App. – 187, which affirmed the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG; (3) in the event that Star Market fails to comply with this Court's order, adjudge Star Market in civil contempt and impose coercive sanctions, including substantial daily fines of at least $10,000 per day until Star Market complies as directed; and (4) award the Government, the Election Officer and the Independent Administrator such other relief, including attorney's fees, as this Court deems appropriate. This Court signed the Order to Show Cause and made it returnable for October 28, 1991, at which time this Court heard argument from both the Government and Star Market.

II. DISCUSSION

Star Market, although it did not appeal the Independent Administrator's decision to this Court, now objects to that decision. Specifically, Star Market asserts that: (1) this Court lacks subject matter jurisdiction because

Star Market is not subject to the Consent Decree; (2) this Court lacks personal jurisdiction over Star Market; (3) the Election Officer and the Independent Administrator's handling of this matter deprived Star Market of due process; (4) the arbitrator's decision is a final and binding adjudication of this matter that pre-empts the decisions of the Election Officer and the Independent Administrator; and (5) the Election Officer violated the Election Rules. This Court finds that Star Market waived its objections to the Independent Administrator's decision, and, in the alternative, that Star Market's objections are wholly without merit.

A. Waiver

Pursuant to the Election Rules, Article XI, § 1 (a) (8), the Independent Administrator's decision "must be followed unless it is stayed or overturned by the Court." The Election Rules have the force of Court Orders and are "enforceable upon pain of contempt." July 10, 1990, Opinion & Order, 742 F. Supp. 94, 108 (S.D.N.Y. 1990), *aff'd,* 931 F.2d 177 (2d Cir. 1991). Star Market did not take the opportunity to appeal the Independent Administrator's decision to this Court. Rather, it brazenly disregarded that decision. Only now that the Government has moved for an order directing compliance under pain of contempt does Star Market argue the merits of the Independent Administrator's decision to this Court.

By failing to appeal that decision to this Court, Star Market waived its rights to contest the merits of the decision. To hold otherwise would encourage parties to disregard the Independent Administrator's decisions until the Government seeks compliance in this Court upon pain of contempt. This Court will not reward parties who flout the Independent Administrator's decisions by allowing them to delay compliance until the Government incurs the expense, time, and effort involved in seeking

an order in this Court directing compliance. Furthermore, such a rule promotes enforcement and speedy resolution of Election Rule violations, which helps to ensure an "honest, fair, and free election completely secure from harassment, intimidation, coercion, hooliganism, threats, or any variant of these no matter under what guise." July 10, 1990 Opinion & Order, 742 F. Supp. 94, 94 (S.D.N.Y. 1990), *aff'd,* 931 F.2d 177 (2d Cir. 1991).

B. Star Market's Objections

Even if Star Market had not waived its right to contest the merits of the Independent Administrator's decision, Star Market's objections are wholly without merit.

1. Subject Matter Jurisdiction

Star Market argues that this Court lacks subject matter jurisdiction because the Consent Decree is not binding on non-parties. This Court has rejected identical arguments on several occasions. *See* October 25, 1991 Order, *slip op.* at 6 (S.D.N.Y. 1991); April 3, 1991 Opinion & Order (S.D.N.Y. 1991) ("Yellow Freight"), *appeal pending,* No. 91-6096 (2d Cir.); May 13, 1991 Memorandum & Order, 764 F. Supp. 817 (S.D.N.Y. 1991), *appeal pending,* 91-6140 (2d Cir.). In *Yellow Freight,* this Court determined that pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651, the Election Rules extend to entities that could jeopardize the IBT membership's right to a free, fair and honest election. Specifically, this Court ruled that Yellow Freight, a company employing IBT members but not itself affiliated with the IBT, was subject to the election rules because it was in a position to "frustrate the implementation of the Consent Decree and the election rules." *Id.;* October 25, 1991 order, *slip on.* at 6 (S.D.N.Y. 1991), May 13, 1991, Memorandum & Order, 764 F. Supp. 817, 821 (S.D.N.Y. 1991).

As in *Yellow Freight,* the Government does not seek to bind Star Market to the Consent Decree, but simply seeks to prevent it from interfering with the election process. Like the employer in *Yellow Freight,* Star Market is in a position to "frustrate the implementation of the Consent Decree and the Election Rules." This case presents an even greater threat to the IBT membership's right to a free, fair, and honest election than did the employer's conduct in *Yellow Freight.* Star Market injected itself into the election process by terminating a union member for exercising his campaign rights under the Election Rules.[2] Such conduct threatens to chill the future exercise of such rights and ultimately threatens the integrity of the election process. Accordingly, the All Writs Act gives this Court subject matter jurisdiction for the limited purpose of preventing such interference with the Election Rules.

2. Personal Jurisdiction

Star Market argues that this Court lacks personal jurisdiction because it does not have minimum contacts with the State of New York or this District. In making such an argument, Star Market ignores the holdings of the Second Circuit and this Court to the contrary. Personal jurisdiction is not required to bind non-parties under the All Writs Act. January 17, 1990 Opinion & Order, 728 F. Supp. 1032, 1048 (S.D.N.Y.), *aff'd,* 907 F.2d 277 (2d Cir. 1990). "The All Writs Act gives the Court the power to bind those who are 'not parties to the original suit.' " *Id.* (quoting *In re Baldwin-United Corp.,* 770 F.2d 328, 338 (2d Cir. 1985)). Moreover, the Racketeer Influenced Corrupt Organizations Act

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2. The Election Rules state that "[a]ll Union members retain the right to participate in campaign activities, including the right to run for office, to openly support or oppose any candidate, to aid or campaign for any candidate, and to make personal campaign contributions." Article VIII, § 10 (a).

("RICO"), 18 U.S.C. §1965(d), "provides for nationwide personal jurisdiction, and this ultimately is a RICO matter." *Id.*

In cases where Congress authorizes nationwide federal jurisdiction, the district court's jurisdiction is co-extensive with the boundaries of the United States. *Mariash v. Morrill,* 496 F.2d 1138, 1143 (2d Cir. 1974). All that is required is sufficient minimum contacts with the United States, not this State or District. *See United States v. IBT,* 907 F.2d at 281. Thus, a defendant who resides within the territorial boundaries of the United States is subject to personal jurisdiction under nationwide service of process without regard to state jurisdictional statutes. *See Mariash,* 496 F.2d at 1143. Further, it is not necessary that the defendant have the requisite minimum contacts with the state that would exercise jurisdiction. *See, e.g., F.T.C. v. Jim Walter Corp.,* 651 F.2d 251, 256 (5th Cir. 1981) ("a resident corporation necessarily has sufficient contacts with the United States to satisfy the requirements of due process"). Accordingly, as a corporation that resides in the United States, Star Market is subject to personal jurisdiction in this action. Star Market's objection to personal jurisdiction is therefore without merit.

3. Due Process

Star Market stressed in its papers and at oral argument that the Court Officers are private parties, and not state actors. (Star Market's Mem. at 10). Star Market also stressed in its papers and at oral argument that the hearings conducted by the Election Officer and the Independent Administrator constituted "State Action." (*Id.* at 12-13). The inconsistency between these two arguments seems to elude Star Market's counsel.

Because the United States Constitution regulates the Government, not private parties, a litigant claiming that his constitutional rights have been violated must first establish the challenged conduct constitutes "state action." *United States v. IBT,* No. 91-6052, *slip op.* . at 6769, 6775-76 (2d Cir. Aug. 6, 1991). In this case, the

Election Officer and the Independent Administrator acted pursuant to the IBT Constitution – a private agreement – and not pursuant to a right or privilege created by the State. *Id.* at 6776. In addition, neither the Election Officer nor the Independent Administrator may fairly be said to be state actors in this case. *Id.* at 6777. Accordingly, because Star Market can not establish the requisite "state action," its constitutional claims must fail.

Even if the Election Officer and Independent Administrator's conduct did establish "state action," Star Market's due process claim is frivolous. Due process is "flexible and calls for such procedural protections as the particular situation demands." *Morrisey v. Brewer,* 408 U.S. 471, 481 (1972). In this case, Star Market received all the process that it was due.

Star Market had the opportunity to present its case to the Election Officer, to appeal the Elections Officer's decision to the Independent Administrator, and to appeal that decision to this Court. The Election Officer, the Independent Administrator, and now this Court, have set forth their factual findings and legal reasoning in written opinions. Furthermore, Star Market had over three months to prepare and submit to the Election Officer evidence and arguments in support of its position. As stated previously, Star Market did not avail itself of the opportunity to appeal to this Court. It is inconsistent for Star Market to argue that it did not receive due process, when it failed to take full advantage of the process it was afforded. This inconsistency also seems to elude Star Market's counsel. Accordingly, Star Market's due process claim is frivolous.

4. Arbitrator's Decision

Star Market argues that because an arbitrator ruled that Star Market did not violate its collective bargaining agreement with IBT Local 25 when it discharged Henderson, the Election Officer may not consider whether the company's action violated the Election Rules. This Court has previously rejected a similar pre-emption

argument. In *Yellow Freight,* this Court rejected the assertion that alleged violations of the Election Rules which might also constitute unfair labor practices under the National Labor Relations Act may be adjudicated only by the National Labor Relations Board. April 3, 1991 Opinion & Order, *slip opinion* at 7-8 (S.D.N.Y. 1991).

As the Election Officer and the Independent Administrator pointed out, whether Star Market violated the collective bargaining agreement's overtime provisions and whether the company violated the election campaign activity provisions of the Election Rules are two entirely separate inquiries. The Election Officer, the Independent Administrator, and this Court need not defer to an arbitration award that interprets a collective bargaining agreement when they adjudicate a claim based on an independent source of rights. *See, e.g..., Barrantine v. Arkansas Best Freight Systems,* 450 U.S. 728 (1981) (an employee who submitted to arbitration under a collective bargaining agreement could still bring an action under the Fair Labor Standards Act in federal district court based on the same facts); *Alexander v. Gardener-Denver Co.,* 415 U.S. 36 (1974) (employee who submitted to arbitration under a collective bargaining agreement could still bring a Title VII action in federal district court based on the same facts). Henderson's rights under the Election Rules are entirely independent of his rights under Star Market's collective bargaining agreement with Local 25.

In *Barrantine v. Arkansas Best Freight Systems,* 450 U.S. at 737, the Supreme Court stated:

> Not all disputes between an employee and his employer are suited for binding resolution in accordance with procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on

> rights arising out of the collective bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide substantive guarantees to individual workers.

Henderson's situation is analogous to *Barrantine.* Henderson's protest arises out of a violation of the Election Rules, which constitute a different source of rights than those arising out of the collective bargaining agreement between Star Market and Local 25. Just as Henderson was entitled to file a grievance under the collective bargaining agreement, he was also entitled, as an IBT member, to assert his rights under the court-approved Election Rules, which derived from the court-approved Consent Decree settling the Government's case against the IBT under RICO. Accordingly, Star Market's argument is wholly without merit.

5. The Election Rules

Star Market argues that the Election Officer violated Article XI, § 1 (a) (4), which provides that "within five days of receipt of the [election] protest, the Election Officer . . . shall determine the merits of the protest and . . . the appropriate remedy, [or] defer making a determination until after the election." Star Market argues that by waiting to decide the case pending the outcome of the arbitration, the Election Officer can not address this protest until after the election. As with all of Star Market's arguments, this argument misses the point.

First, the Election Officer's decision not to proceed on this election protest pending the outcome of arbitration was an appropriate "remedy" under the first prong of Article XI, §1(a) (4). Second, the Election Officer may initiate an investigation without a protest. Article XI, §2 provides that:

> If as a result of any protest filed or any investigation undertaken by the Election Officer *with or without a protest,* the Election Officer determines that these

> Rules have been violated, or that any other conduct has occurred which may prevent or has prevented a fair, honest and open election, the Election Officer may take whatever remedial action is appropriate. (emphasis added).

The Election Officer's investigation after the arbitrator's decision can therefore be considered an investigation undertaken by the Election Officer without an election protest. Such an investigation is appropriate in this case and consistent with the purpose of ensuring a fair, honest and open election. Accordingly, Star Market's argument is without merit.

C. The Independent Administrators' Decision

The Government asks this Court to affirm the September 18, 1991 decision of the Independent Administrator. It. is well settled that the findings of the Independent Administrator "are entitled to great deference." *United States v. International Brotherhood of Teamsters,* 905 F.2d 610, 616 (2d Cir. 1990), *aff'd.* March 13, 1990 Opinion & Order, 743 F. Supp. 155 (S.D.N.Y. 1990). This Court will overturn the findings of the Independent Administrator when it determines that they are, on the basis of all the evidence, "arbitrary or capricious." *Id.* at 622; October 25, 1991, Order, *slip opinion,* at 4-5 (S.D.N.Y. 1991); October 24, 1991 Memorandum & Order, *slip opinion,* at 4-5 (S.D.N.Y. 1991); October 16, 1991 Memorandum & Order, *slip opinion,* at 4-5 (S.D.N.Y. 1991); October 11, 1991 Memorandum & order, *slip opinion,* at 3 (S.D.N.Y. 1991); October 9, 1991 Memorandum & Order, *slip opinion,* at 5 (S.D.N.Y. 1991); August 14, 1991 Memorandum & Order, *slip opinion,* at 4 (S.D.N.Y. 1991); July 31, 1991 Memorandum & Order, *slip opinion* at 3-4 (S.D.N.Y. 1991); July 18, 1991 Memorandum & Order, *slip opinion* at 3-4 (S.D.N.Y. 1991); July 16, 1991 Opinion & Order, *slip opinion,* at 3-4 (S.D.N.Y. 1991); June 6, 1991 Opinion & Order, *slip opinion,* at 4-5

(S.D.N.Y. 1991); May 13, 1991 Memorandum & Order, 764 F. Supp. 817, 820-21 (S.D.N.Y. 1991); May 9, 1991 Memorandum & Order, 764 F. Supp. 797, 800 (S.D.N.Y. 1991); May 6, 1991 Opinion & Order, 764 F. Supp. 787, 789 (S.D.N.Y. 1991); December 27, 1990 Opinion & Order, 754 F. Supp. 333, 337 (S.D.N.Y. 1990); September 18, 1990 Opinion & Order, 745 F. Supp. 189, 191-92 (S.D.N.Y. 1990); August 27, 1990 Opinion & Order, 745 F. Supp. 908, 911 (S.D.N.Y. 1990); March 13, 1990 Opinion & Order, *supra,* 743 F. Supp. at 159-60, *aff'd,* 905 F.2d at 622; January 17, 1990 Opinion & Order, 728 F. Supp. 1032, 1045-57, *aff'd,* 907 F.2d 277 (2d Cir. 1990); November 2, 1989 Memorandum & Order, 725 F.2d 162, 169 (S.D.N.Y. 1989). Star Market argues that the decision of the Independent Administrator was arbitrary and capricious.

Notwithstanding Star Market's contention, the decision of the Independent Administrator was fully supported by the record and was neither arbitrary nor capricious. Applying the mixed motive analysis standard established in *NLRB v. Wright Line,* 251 NLRB 10182, 105 LRRM 1169 (1980), *aff'd,* 662 F. 2d 899 (1st Cir. 1981), *cert. denied,* 455 U.S. 989 (1982), the Independent Administrator found that Henderson made a *prima facie* showing that his support of Carey was a motivating factor in his discharge. (Ind. Admin. Dec. at 8). Further, the Independent Administrator found that Star Market did not rebut its burden of demonstrating that it would have discharged Henderson regardless of his campaign activity. (*Id.* at 8-9). The two major considerations support the finding that Star Market discharged Henderson because of his campaign activities. The Independent Administrator found that there was no evidence of an employee ever having been terminated for "stealing time," and that other employees who left their work stations before the overtime period ended were not disciplined. Based on these considerations and a review

of all the evidence, the Independent Administrator determined that the only explanation for Star Market's actions was that "[i]t was retaliating against Mr. Henderson because of his political activity and his support of Carey." (Ind. Admin. Dec. at 10).

The decision of the Independent Administrator is fully supported by the record and is neither arbitrary nor capricious. Star Market's arguments to the contrary are wholly without merit. Accordingly, the decision of the Independent Administrator is affirmed. Star Market is therefore ordered to comply fully with the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 – Elec. App. – 187, which decision affirmed the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG. Full compliance must take place within twenty-four hours of the filing of this opinion and order.

D. Civil Contempt

A court may exercise its inherent power to hold a party in civil contempt when: (1) the order the party allegedly failed to comply with is clear and unambiguous; (2) the proof of non-compliance is clear and convincing; and (3) the party has not diligently attempted in a reasonable manner to comply. *New York State Nat'l Organ. for Women v. Terry,* 886 F.2d 1339, 1351 (2d Cir. 1989). A civil contempt sanction may serve either to coerce the contemnor into future compliance or to compensate the complainant for losses resulting from the contemnor's past noncompliance. *Id.* at 1352. A person charged with civil contempt is entitled to notice of the allegations, the right to counsel, and a hearing at which the plaintiff bears the burden of proof and the defendant has an opportunity to present a defense. *United States v. City of Yonkers,* 856 F.2d 444, 452 (2d Cir. 1988), *rev'd on other grounds,* 110 S.Ct. 625 (1990).

As this Court has previously stated, the Election Rules are the linchpin of the Consent Decree's attempt

to cleanse the IBT of the hideous influence of Organized Crime. July 10, 1990 Opinion & Order, 742 F. Supp. at 97. Star Market has violated the Election Rules by firing Henderson, a political opponent of Teamster's officials whom the company apparently favors, for engaging in clearly protected union election activity. In addition, Star Market's scorn for the dispute resolution process established by the Election Rules, and approved by this Court and the Second Circuit, has been as egregious as the company's discriminatory treatment of Henderson.

In the event that Star Market fails to comply with this Court's order, Star Market shall be adjudged in civil contempt, and will incur a coercive sanction of $10,000 per day until Star Market complies as directed by this Court. In addition, an award of attorney's fees and other expenses to the Government and the court-appointed officers will serve to compensate them for Star Market's baseless refusal either to comply with the Election Officer' s order as affirmed by the Independent Administrator or to appeal that decision to this Court. To this end, the Government, the Election Officer and the Independent Administrator are directed to submit affidavits, within ten days of the filing of this opinion and order, of attorneys' fees and other expenses incurred in connection with Star Market's refusal to comply with the Election Officer's decision as affirmed by the Independent Administrator. Further, Star Market shall submit to this Court an affidavit by a person in a senior management position stating that it has complied with this Court's order and shall also submit to this Court a copy of the letter it sends to Henderson which states that he is reinstated with full seniority, full back pay and benefits.

E. The Stay

In the event that this Court granted the Government's application, Star Market petitioned this Court for a stay of its order. In this circuit, the standards for

issuing a stay encompass the following considerations: (a) Whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (b) Whether the applicant will be irreparably injured absent a stay; (c) Whether the issuance of a stay will substantially injure other parties interested in the proceedings; and (d) Where the public interest lies. *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987).

Applying these criteria to the instant application, I find that the request for a stay is denied. First, as fully set forth above, the movants have not made a strong showing that they are likely to succeed on the merits. Second, I find that the movants will face no irreparable harm from the remedies ordered to correct the retaliatory action taken by Star Market in violation of the Election Rules. The third criteria is whether staying the ruling will cause injury to any other interested party. Granting a stay will prejudice Henderson, the candidates for IBT office, and the IBT rank and file in general. Finally, the public interest lies in furthering the noble goal and promoting democratic, secret ballot elections in the IBT. Over the years, the IBT has been tarnished with a patina of corruption, thus actions to clear this ignominious and sordid history seem indubitably in the interest of IBT officials, the IBT rank and file, and the public as well. The petition for a stay is hereby denied.

CONCLUSION

In sum, the orders of this Court are as follows:

IT IS HEREBY ORDERED that the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 – Elec. App. – 187, which decision affirmed the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG, is affirmed; and

IT IS FURTHER ORDERED that Star Market must comply fully within twenty-four hours of the filing of this opinion and order, with this Court's order which affirms

the September 18, 1991 decision of the Independent Administrator in Election Appeal 91 – Elec. App. – 187, which decision affirmed the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG; and

IT IS FURTHER ORDERED that in the event that Star Market fails to comply with this Court's order, Star Market shall be adjudged in civil contempt, and will incur a coercive sanction of $10,000 per day until Star Market complies as directed by this Court; and

IT IS FURTHER ORDERED that Star Market shall compensate the Government, the Election Officer and the Independent Administrator for their attorney's fees and other expenses incurred in connection with Star Market's baseless refusal to comply with the Election officer's decision as affirmed by the Independent Administrator; and

IT IS FURTHER ORDERED that the Government, the Election Officer and the Independent Administrator submit affidavits, within ten days of the filing of this opinion and order, of attorneys fees and other expenses incurred in connection with Star Market's baseless refusal to comply with the Election Officer's decision as affirmed by the Independent Administrator; and

IT IS FURTHER ORDERED that Star Market shall submit to this Court an affidavit by a person in a Senior Management position stating that it has complied with this Court's order, and Star Market shall also submit to this Court a copy of the letter it sends to Henderson in which it indicates that he is reinstated with full seniority, full back pay and benefits; and

IT IS FURTHER ORDERED that Star Market's petition for a stay is denied.

SO ORDERED.

Dated: October 29, 1991 at 10:30 a.m.
New York, New York.

/s/

U.S.D.J.

F. Court-Appointed Officers

12. The Court shall appoint three (3) officers – an Independent Administrator, an Investigations Officer and an Election Officer – to be identified and proposed by the Government and the union defendants, to oversee certain operations of the IBT as described herein. The parties shall jointly propose to the Court at least two persons for each of these three positions. Such proposal shall be presented to the Court within four weeks of the date of the entry of this order, except that for good cause shown such period may be extended by the Court. Except as otherwise provided herein, the duties of those three officers shall be the following:

(A) DISCIPLINARY AUTHORITY – From the date of the Administrator's appointment until the termination of the Administrator's authority as set forth in paragraph 3(3) herein, the Administrator shall have the same rights and powers as the IBT's General President and/or General Executive Board under the IBT's Constitution (including Articles VI and XIX thereof) and Title 29 of the United States Code to discharge those duties which relate to: disciplining corrupt or dishonest officers, agents, employees or members of the IBT or any of its affiliated entities (such as IBT Locals, Joint Councils and Area Conferences), and appointing temporary trustees to run the affairs of any such affiliated entities. The Investigations Officer shall have the authority to investigate the operation of the IBT or any of its affiliates and, with cause,

(i) To initiate disciplinary charges against any officer, member or employee of the IBT or any of its affiliates in the manner specified for members under the IBT Constitution and,

(ii) To institute trusteeship proceedings for the purpose and in the manner specified in the IBT Constitution.

Prior to instituting any trusteeship proceeding the Investigations Officer shall notify the General President of the Investigations Officer's plan to institute said trusteeship proceeding and the basis therefor and give the General President ten (10) days to exercise his authority pursuant to the IBT Constitution to institute such trusteeship proceedings. If the General President timely institutes such proceedings and/or a trusteeship is imposed, the Investigations Officer and the Administrator shall have authority to review any action thus taken by the General President and/or any trusteeship imposed thereafter and to modify any aspect of either of the above at any time and in any manner consistent with applicable federal law. If the General President fails to institute trusteeship proceedings within the ten-day period prescribed herein, the Investigations Officer may immediately proceed in accordance with the authority specified above.

When the Investigations Officer files charges, the following procedures shall be observed:

(a) the Investigations Officer shall serve written specific charges upon the person charged;

(b) the person charged shall have at least thirty (30) days prior to hearing to prepare his or her defense;

(c) a fair and impartial hearing shall be conducted before the Administrator;

(d) the person charged may be represented by an IBT member at the hearing; and

(e) the hearing shall be conducted under the rules and procedures generally applicable to labor arbitration hearings.

The Administrator shall preside at hearings in such cases and decide such cases using a "just cause" standard. The Investigations Officer shall present evidence at such hearings. As to decisions of the IBT General Executive Board on disciplinary charges and trusteeship proceedings during the Administrator's tenure, the Administrator shall review all such decisions, with the right to affirm, modify or reverse such decisions and, with

respect to trusteeship proceedings, to exercise the authority granted above in this paragraph. Any decision of the Administrator shall be final and binding, subject to the Court's review as provided herein. For a period of up to fourteen (14) days after the Administrator's decision, any person charged or entity placed in trusteeship adversely affected by the decision shall have the right to seek review by this Court of the Administrator's decision. The Administrator shall also have the right to establish and disseminate new guidelines for investigation and discipline of corruption within the IBT. All of the above actions of the Administrator and Investigations Officer shall be in compliance with applicable Federal laws and regulations.

(B) REVIEW AUTHORITY — From the date of the Administrator's appointment until the certification of the IBT elections to be conducted in 1991, the Administrator shall have the authority to veto whenever the Administrator reasonably believes that any of the actions or proposed actions listed below constitutes or furthers an act of racketeering activity within the definition of Title 18 U.S.C. §1961, or furthers or contributes to the association directly, or indirectly, of the IBT or any of its members with the LCN or elements thereof:

(i) any expenditures or proposed expenditure of International Union funds or transfer of International Union property approved by any officers, agents, representatives or employees of the IBT,

(ii) any contract or proposed contract on behalf of the International Union, other than collective bargaining agreements, and

(iii) any appointment or proposed appointments to International Union office of any officer, agent, representative or employee of the IBT.

In any case where the Administrator exercises veto authority, the action or proposed action shall not go forward. The Administrator, upon request of the IBT's

General President or General Executive Board, shall, within three (3) days, advise the IBT's General President and/or General Executive Board whichever is applicable, of the reasons for any such veto. For a period of up to fourteen (14) days after the Administrator's decision, the IBT's President and/or General Executive Board shall have the right to seek review by this Court of the Administrator's decision. The Administrator may prescribe any reasonable mechanism or procedure to provide for the Administrator's review of actions or proposed actions by the IBT, and every officer, agent, representative or employee of the IBT shall comply with such mechanism or procedure.

(C) ACCESS TO INFORMATION -- (i) The Investigations Officer shall have the authority to take such reasonable steps that are lawful and necessary in order to be fully informed about the activities of the IBT in accordance with the procedures as herein established. The Investigations Officer shall have the right:

(a) To examine books and records of the IBT and its affiliates, provided the entity to be examined receives three (3) business days advance notice in writing, and said entity has the right to have its representatives present during said examination.

(b) To attend meetings or portions of meetings of the General Executive Board relating in any way to any of the officer's rights or duties as set forth in this Order, provided that prior to any such meeting, the officer shall receive an agenda for the meeting and then give notice to the General President of the officer's anticipated attendance.

(c) To take and require sworn statements or sworn in-person examinations of any officer, member, or employee of the IBT provided the Investigations Officer has reasonable cause to take such a statement and provided further that the person to be examined receives at least ten (10) days advance notice in writing and also has the right to be represented by an IBT member or legal

counsel of his or her own choosing, during the course of said examination.

(d) To take, upon notice and application for cause made to this Court, which shall include affidavits in support thereto, and the opportunity for rebuttal affidavits, the sworn statements or sworn in person examination of persons who are agents of the IBT (and not covered in subparagraph (c) above).

(e) To retain an independent auditor to perform audits upon the books and records of the IBT or any of its affiliated entities (not including benefit funds subject to ERISA), provided said entity receives three (3) business days advance notice in writing and said entity has the right to have its representative present during the conduct of said audit.

(ii) The Independent Administrator and the Election Officer shall have the same rights as the Investigations Officer as provided in sections (a), (b), (c) and (d) of A, herein.

(iii) The Independent Administrator, Investigations Officer and Election Officer shall each be provided with suitable office space at the IBT headquarters in Washington, D.C.

D. IBT ELECTION – The IBT Constitution shall be deemed amended, and is hereby amended, to provide for the following new election procedures:

(i) The procedures described herein shall apply to elections of the IBT's General President, General Secretary-Treasurer, International Union Vice Presidents, and International Union Trustees;

(ii) Delegates to the IBT International convention at which any International Union officers are nominated or elected shall be chosen by direct rank-and-file secret balloting shortly before the convention (but not more than six months before the convention, except for those delegates elected at

local union elections scheduled to be held in the fall of 1990), and with all convention Candidate election voting by secret ballot of each delegate individually;

(iii) Delegates shall nominate candidates for eleven (11) Regional Vice Presidents, as follows: Three (3) from the Eastern Conference, three (3) from the Central Conference, two (2) from the Southern Conference, two (2) from the Western Conference, and one (1) from the Canadian Conference. In addition, there shall be nominated candidates for five (5) Vice Presidents to be elected at large. All duly nominated Vice Presidents shall stand for election conducted at local unions on the same ballot and time as the election of General President and General Secretary-Treasurer, as provided herein;

(iv) At such an International convention, after the nomination of International Union Vice Presidents and election of Trustees, all delegates shall then vote for nominees for the offices of IBT General President and Secretary-Treasurer;

(v) To qualify for the ballot for the direct rank-and-file voting for IBT General President, Secretary-Treasurer, and Vice President, candidates must receive at least five (5) percent of the delegate votes at the International convention, for the at large position, or by conference for regional positions, as the case may be;

(vi) No person on the ballot for the position of IBT General President may appear on the ballot in the same election year for the position of Secretary-Treasurer; and further no member shall be a candidate for more than one (1) Vice President position;

(vii) No less than four (4) months and no more than six (6) months after the International convention at which candidates were nominated, the IBT

General President, General Secretary-Treasurer and Vice Presidents shall be elected by direct rank-and-file voting by secret ballot in unionwide, one-member, one-vote elections for each at large position, and conference wide, one-member one-vote elections for each regional position;

(viii) All direct rank-and-file voting by secret ballot described above shall be by in-person ballot box voting at local unions or absentee ballot procedures where necessary, in accordance with Department of Labor regulations; and

(ix) The current procedures under the IBT Constitution for filling a vacancy between elections in the office of General Secretary-Treasurer, International Trustee, and International Vice President shall remain in effect.

The Election Officer shall supervise the IBT election described above to be conducted in 1991 and any special IBT elections that occur prior to the IBT elections to be conducted in 1991. In advance of each election, the Election Officer shall have the right to distribute materials about the election to the IBT membership. The Election Officer shall supervise the balloting process and certify the election results for each of these elections as promptly as possible after the balloting. Any disputes about the conduct and/or results of elections shall be resolved after hearing by the Administrator.

The union defendants consent to the Election Officer, at Government expense, to supervise the 1996 IBT elections. The union defendants further consent to the U.S. Department of Labor supervising any IBT elections or special elections to be conducted after 1991 for the office of the IBT General President, IBT General Secretary-Treasurer, IBT Vice President, and IBT Trustee.

At the IBT 1991 International Convention, the delegates shall be presented with these aforesaid amendments for vote; provided further that nothing herein shall be deemed or interpreted or applied to abridge the Landrum-Griffin free speech right of any IBT officer, delegate or member, including the parties hereto.

(E) REPORTS TO MEMBERSHIP – The Administrator shall have the authority to distribute materials at reasonable times to the membership of the IBT about the Administrator's activities. The reasonable cost of distribution of these materials shall be borne by the IBT. Moreover, the Administrator shall have the authority to publish a report in each issue of the *International Teamster* concerning the activities of the Administrator, Investigations Officer and Election Officer.

(F) REPORTS TO THE COURT – The Administrator shall report to the Court whenever the Administrator sees fit but, in any event, shall file with the Court a written report every three (3) months about the activities of the Administrator, Investigations Officer and Election Officer. A copy of all reports to the Court by the Administrator shall be served on plaintiff United States of America, the IBT's General President and duly designated IBT counsel.

(G) HIRING AUTHORITY – The Administrator, the Investigations Officer and the Election Officer shall have the authority to employ accountants, consultants, experts, investigators or any other personnel necessary to assist in the proper discharge of their duties. Moreover, they shall have the authority to designate persons of their choosing to act on their behalf in performing any of their duties, as outlined in subparagraphs above. Whenever any of them wish to designate a person to act on their behalf, they shall give prior written notice of the designation to plaintiff United States of America, and the IBT's General President; and those parties shall then have the right, within fourteen (14) days of receipt of notice, to seek review by this Court of the designation,

which shall otherwise take affect fourteen (14) days after receipt of notice.

(H) COMPENSATION AND EXPENSES – The compensation and expenses of the Administrator, the Investigations Officer and the Election Officer (and any designee or persons hired by them) shall be paid by the IBT. Moreover, all costs associated with the activities of these three officials (and any designee or persons hired by them) shall be paid by the IBT. The Administrator, Investigations Officer and Election Officer shall file with the Court (and serve on plaintiff United States of America and the IBT's General President and designated IBT counsel) an application, including an itemized bill, with supporting material, for their services and expenses once every three months. The IBT's General President shall then have fourteen (14) business days following receipt of the above in which to contest the bill before this Court. If the IBT's President fails to contest such a bill within that 14-day period, the IBT shall be obligated to pay the bill. In all disputes concerning the reasonableness of the level or amount of compensation or expense to be paid, the Court and parties shall be guided by the level of payment as authorized and approved by the IBT for the payment of similar services and expenses.

(I) APPLICATION TO THE COURT – The Administrator may make any application to the Court that the Administrator deems warranted. Upon making any application to the Court, the Administrator shall give prior notice to plaintiff United States of America, the IBT's General President and designated IBT counsel and shall serve any submissions filed with the Court on plaintiff United States of America, the IBT's General President and designated IBT counsel. Nothing herein shall be construed as authorizing the parties or the Court-appointed officers to modify, change or amend the terms of this Order.

G. Independent Review Board

Following the certification of the 1991 election results, there shall be established an Independent Review Board, (hereinafter, referred to as the "Review Board"). Said Board shall consist of three members, one chosen by the Attorney General of the United States, one chosen by the IBT and a third person chosen by the Attorney General's designee and the IBT's designee. In the event of a vacancy, the replacement shall be selected in the same manner as the person who is being replaced was selected.

(a) The Independent Review Board shall be authorized to hire a sufficient staff of investigators and attorneys to investigate adequately (1) any allegations of corruption, including bribery, embezzlement, extortion, loan sharking, violation of 29 U.S.C. §530 of the Landrum Griffin Act, Taft-Hartley Criminal violations or Hobbs Act violations, or (2) any allegations of domination or control or influence of any IBT affiliate, member or representative by La Cosa Nostra or any other organized crime entity or group, or (3) any failure to cooperate fully with the Independent Review Board in any investigation of the foregoing.

(b) The Independent Review Board shall exercise such investigative authority as the General President and General Secretary-Treasurer are presently authorized and empowered to exercise pursuant to the IBT Constitution, as well as any and all applicable provisions of law.

(c) All officers, members, employees and representatives of the IBT and its affiliated bodies shall cooperate fully with the Independent Review Board in the course of any investigation or proceeding undertaken by it. Unreasonable failure to cooperate with the Independent Review Board shall be deemed to be conduct which brings reproach upon the IBT and which is thereby within the Independent Review Board's investigatory and decisional authority.

(d) Upon completion of an investigation, the Independent Review Board shall issue a written report detailing its findings, charges, and recommendations concerning the discipline of union officers, members, employees, and representatives and concerning the placing in trusteeship of any IBT subordinate body. Such written reports shall be available during business hours for public inspection at the IBT office in Washington, D.C.

(e) Any findings, charges, or recommendations of the Independent Review Board regarding discipline or trusteeship matters shall be submitted in writing to an appropriate IBT entity (including designating a matter as an original jurisdiction case for General Executive Board review) , with a copy sent to the General President and General Executive Board. The IBT entity to which a matter is referred shall thereupon promptly take whatever action is appropriate under the circumstances, as provided by the IBT Constitution and applicable law. Within 90 days of the referral, that IBT entity must make written findings setting forth the specific action taken and the reasons for that action.

(f) The Independent Review Board shall monitor all matters which it has referred for action if, in its sole judgment, a matter has not been pursued and decided by the IBT entity to which the matter has been referred in a lawful, responsible, or timely manner, or that the resolution proposed by the relevant IBT entity is inadequate under the circumstances, the Independent Review Board shall notify the IBT affiliate involved of its view, and the reasons therefor. A copy of said notice shall be sent by the Independent Review Board, to the General President and the General Executive Board.

(g) Within 10 days of the notice described in paragraph (f) above, the IBT entity involved shall set forth in writing any and all additional actions it has taken and/or will take to correct the defects set forth in said notice and a deadline by which said action may be completed. Immediately thereafter, the Independent Review Board

shall issue a written determination concerning the adequacy of the additional action taken and/or proposed by the IBT entity involved. If the Independent Review Board concludes that the IBT entity involved has failed to take or propose satisfactory action to remedy the defects specified by the Independent Review Board's notice, the Independent Review Board shall promptly convene a hearing, after notice to all affected parties. All parties shall be permitted to present any facts, evidence, or testimony which is relevant to the issue before the Independent Review Board . Any such hearing shall be conducted under the rules and procedures generally applicable to labor arbitration hearings.

(h) After a fair hearing has been conducted, the Independent Review Board shall issue a written decision which shall be sent to the General President, each member of the General Executive Board, and all affected parties.

(i) The decision of the Independent Review Board shall be final and binding, and the General Executive Board shall take all action which is necessary to implement said decision, consistent with the IBT Constitution and applicable Federal laws.

(j) The Independent Review Board shall have the right to examine and review the General Executive Board's implementation of the Independent Review Board's decisions; in the event the Independent Review Board is dissatisfied with the General Executive Board's implementation of any of its decisions, the Independent Review Board shall have the authority to take whatever steps are appropriate to insure proper implementation of any such decision.

(k) The Independent Review Board shall be apprised of and have the authority to review any disciplinary or trusteeship decision of the General Executive Board, and shall have the right to affirm, modify, or reverse any such decision. The Independent Review Board's affirmance, modification, or reversal of any such

General Executive Board decision shall be in writing and final and binding.

(l) The IBT shall pay all costs and expenses of the Independent Review Board and its staff (including all salaries of Review Board members and staff). Invoices for all such costs and expense shall be directed to the General President for payment.

(m) The Investigations Officer and the Administrator shall continue to exercise the investigatory and disciplinary authority set forth in paragraph 12 above for the limited period set forth in paragraph 3(3) above, provided, however, that the Investigations Officer and the Administrator may, instead, refer any such investigation or disciplinary matter to the Independent Review Board.

(n) The IBT Constitution shall be deemed and hereby is amended to incorporate all of the terms relating to the Independent Review Board set forth above in this paragraph. This amendment shall be presented to the delegates to the 1991 Convention for vote.

AGREEMENT

–BETWEEN–

TEAMSTERS LOCAL UNION NO. 25

affiliated with the

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

and

STAR MARKET COMPANY

DIVISION OF JEWEL COMPANIES, INC.

(WAREHOUSE)

MAY 14, 1989 TO MAY 16, 1992

(d) Non Discrimination

Section 1.

In accordance with applicable law, the Employer and the Union agree not to discriminate against any individual with respect to hiring, compensation, terms or conditions of employment because of such individual's race, color, religion, sex, national origin, pregnancy or age; nor will they limit, segregate or classify employees in any way to deprive any individual employee of employment opportunities because of race, color, religion, sex, national origin, pregnancy, or age.

Section 2.

The Company and the Union agree that there will be no discrimination by the Company or the Union against any employee because of his or her membership in the Union or because of any employee's lawful activity and/or support of the Union.

ARTICLE 7

Grievance Procedure

Section 1. A grievance is hereby jointly defined to be any controversy, complaint, misunderstanding or dispute.

Any grievance arising between the Company and the Union or an employee represented by the Union shall be settled in the following manner:

Step 1

The aggrieved employee or employees must present the grievance to his Steward within ten (10) working days after the reason for the grievance has occurred, except no time limit shall apply in case of violation of wage provisions of this Agreement. If a satisfactory settlement is not effected with Supervision within ten (10) working days, the Steward and employee shall

submit such grievance in writing to the Union's Business Representative.

Step 2

The Business Representative shall then take the matter up with a representative of the Company with authority to act upon such grievance. A decision must be made within ten (10) working days. If not then adjusted, it may be submitted by either or both parties to the permanent Arbitrator mutually agreed upon by the Employer and the Union to serve in such capacity for the duration of this Agreement; provided, however, that either party may, if it so desires, have the grievance submitted to the Joint Area Committee in lieu of the permanent Arbitrator. Both the Company and the Union agree that the subject matter of the grievance shall be settled by such permanent Arbitrator or, as the case may be, by the Joint Area Committee, and that the decision rendered shall be final and binding. In the event that any issue of retroactivity cannot be mutually agreed upon by the Company and the Union, such issue shall be made a part of the grievance and final decision. Neither the permanent Arbitrator nor the Joint Area Committee shall make any rules or render any decision in conflict with the provisions of this Agreement.

Step 3

If the Company fails to comply with any settlement of the grievance or fails to comply with the procedures of this Article, the Union has the right to take all legal and economic action to enforce its demands.

Section 2. A Steward or Alternate Steward shall be permitted to leave his or her work to investigate and adjust the grievance of any employee within his jurisdiction after notification to his supervisor. Enployees shall have the Steward or a representative of the Union present during the discussions of any grievance with

representatives of the Company. In the event an employee is summoned to meet with a supervisor in an enclosed office for the purpose of discussing disciplinary action, said employee shall be entitled to be accompanied by the steward or alternate steward if said employee requests such representation and the steward or alternate steward is available during the shift; if the steward or alternate steward is unavailable, then, upon request td the employee, the employee may request that a Union member be present.

Section 3. Notwithstanding anything herein contained, it is agreed that in the event the Employer is delinquent at the end of a period of payment of his contribution to the Health and Welfare or Pension Funds, created under this Agreement in accordance with the rules and regulations of the Trustees of such funds, after the proper official of the Local Union has given 72 hours notice to the Employer of such delinquency in Health and Welfare and/or Pension payment, the Union shall have the right to take such action as may be necessary until such delinquent payments are made, and it is further agreed that in the event such action is taken, the Employer shall be responsible to the employees for losses resulting therefrom.

ARTICLE 8

Protection of Rights

Section 1. No Strike, Work Stoppage or Lockout

(a) The Union and the Employer agree that there shall be no strike, lockout, tie-up, or legal proceedings without first using all possible means of settlement, including the Grievance Procedures as provided for in Article 7 of the Agreement, or any controversy which might arise.

Dear Michael H. Holland

This letter is confidential and must be read before persuing my protest of being discharged!

The company has had and will have a great advantage at the New England Joint Area Grievance Panel because one of McCarthy's candidates Alfred Singelias who we beat is the Co-Secretary of the grievance panel and he chooses the union panelists who will decide my discharge case on 5/22/91. The company knows the situation and may have made a deal with McCarthy loyalists to fix this decision. Star Market will get rid of the steward and McCarthy will get rid of the reform delegate for Carey.

I'm also in a dilemma that is a Catch 22. I didn't know Jack's position until 5/9/91 even though I was sent home 5/2/91. I have to file this protest in time or it will be waived but if the grievance panel knows that there is any type of pending litigation they will not hear the case and I will remain discharged. It is crucial that this protest isn't disclosed until after the grievance panels decision is rendered to me in writing from Bill Carnes!

Please call me for the complete details.

Thank you
Neal J. Henderson
36 Waverly Street
Brockton, Ma. 02401-3408
(508) 586-5531

Dear Michael H. Holland

I am a Local 25 delegate committed to nominate Ron Carey for General President and I was unjustly suspended pending investigation by my employer Star Market because I left early for break on Thursday 5/2/91. On the next Thursday 5/9/91 at 2 PM the manager Jack Kelliher had completed his investigation and met with my Business Agent Bill Carnes and myself to inform us that he is discharging me for dishonesty, stealing company time. I feel that this punishment is extremely severe and may be among other things politically motivated.

I believe Jack's mind was already made up because I explained to him that I was conducting union business as shop steward trying to contact Bill Carnes about issues that Jack brought up at a meeting Wednesday 5/1/91. In the past I have left the job to conduct union business without notifying the supervisor because I just wait until my work is caught up, unless it is imperative. I also wasn't the only one who left early for that break or other breaks before and after that break. I realize that sounds peculiar but, they also pay us for eight hours even though we sometimes finish after six hours work and go home.

Thank you
Neal J. Henderson
36 Waverly Street
Brockton, Ma. 02401-3408
(508) 586-5531

OFFICE OF THE ELECTION OFFICER
c/o INTERNATIONAL BROTHERHOOD
OF TEAMSTERS
25 Louisiana Avenue, NW
Washington, DC 20001

Michael H. Holland
Election Officer

(202) 624-8778
1-800-828-6496
Fax (202) 624-8792

May 14, 1991

VIA UPS OVERNIGHT

Neal Henderson
36 Waverly Street
Brockton, MA 02401-3408

William J. McCarthy
President
Teamsters Local 25
544 Main St.
Boston, MA 02129

Jack Kelliher
c/o Star Market
625 University Ave.
Norwood, MA 02062

Re: Election Office Case No. P-760-LU25-ENG

Gentlemen:

This will acknowledge receipt of the above referenced election protest filed under Article XI, § 1 of the *Rules for the IBT International Union Delegate and Officer Election,* revised August 1, 1990 (*"Rules"*), a copy of which is enclosed. The protest concerns the propriety under the *Rules* of Mr. Henderson's discharge from Star Market. The Election Officer has received information that a hearing has been scheduled on the propriety of this discharge for May 22, 1991 under and pursuant to the procedures set forth the Collective Agreement between Star Market and the Union. The Election Officer has therefore determined to defer his decision in this matter until after the presently scheduled hearing.

The Election Officer has, pursuant to the *Rules,* jurisdiction and authority to determine the instant protest on its merits. See In re: McGinnis, Clement, and IBT Local Union 710, and Yellow Freight Systems, Inc., 91 Elec. App. 43 affd. (S.D.N.Y., April 3, 1991). Further, the Election Officer is not bound, in whole or in part, by the decision reached in the grievance proceedings or by the findings of fact or conclusions of law made during the grievance process. See In re: Schrader, and Local Union 171 and Arkansas Best Freight, 912 Elec. App. 124.

Thus while the Election Officer will defer his decision in this matter, he has the authority to conduct an independent investigation of the allegations of the protest and issue decision on the merits of the protest based upon his determination and evaluation of the evidence presented to him in such independent investigation. Since the Election Officer will defer ruling on this protest until after the completion of the contractual mandated grievance processes, the investigation and decision will also include a review of the processes and the representation afforded Mr. Henderson in those processes, both by his representative and the members of the grievance panel.

The protest has been assigned for investigation to the Washington Office of the Election Officer whose name, address, and telephone number appear below. Because the *Rules* require that protests be investigated in an expeditious manner, all interested parties, including the person(s) filing the protest, the individual(s) named in the charge, as well as the Local Union and the representatives of affected candidate(s), should immediately contact the Washington Office of the Election Officer with all information relevant to the allegations contained in the protest. Such information may include the names, address, and telephone numbers of any witness or persons with information concerning the

allegations in the protest. Similarly, any relevant documents should be immediately provided to the Washington Officer of the Election Officer.

All parties are requested to fully cooperate with the Washington Office of the Election Officer in the investigation of this matter. Absent extraordinary circumstances, no party may rely upon evidence that was not provided to the Washington Office of the Election Officer in any appeal of the Election Officer's determination regarding the protest.

Very truly yours,

/s/

Michael M. Holland

MHH/pjm

cc: Elizabeth A. Rodgers, Regional Coordinator
(For Information Only)

NEW ENGLAND JOINT AREA COMMITTEE

Established in accordance with the terms and conditions of the New England Supplemental Freight Agreement entered into by and between the several Local Unions and the for-hire Motor Carriers operating in and/or servicing New England.

In the Matter of the Dispute between:	CASE NUMBER 91-519*
Local 25 – Teamsters	In all communications relative to this case please refer to the above number.
vs.	SUBMISSION
Star Market Company	

We the undersigned, parties to the New England Supplemental Freight Agreement, hereby agree to submit, under the rules of procedure prescribed by the New England Joint Area Committee, by virtue of its authority as set forth in the New England Supplemental Freight Agreement, the following:

"Violation of Article 9 discharge involving Neal Henderson."

"Union seeks reinstatement and make whole for all losses."

Carnes

THE UNDERSIGNED further agree that the decision of the New England Joint Area Committee in the above dispute will be final, conclusive and binding, as provided by the New England Supplemental Freight Agreement.

THE UNDERSIGNED also agrees that failure to comply with the decision of the committee within 10 days of the date of RECEIPT OF WRITTEN DECISION will result in the loss of all contract rights, privileges and benefits due them under the New England Supplemental Freight Agreement.

Employer .....

Date: Signed by ..... Title....

May 22, 1991 Union..... Total ...

Signed by ..... Title....

DECISION

Deadlocked

COMMITTEE

.....	.....
.....	.....
.....	.....

CASE NUMBER 91-519*

In all communications relative to this case please refer to the above number.

ARBITRATION

In the matter in arbitration between:

Star Market Company,
Division of Jewell Companies, Inc.
625 Mount Auburn Street
Cambridge, MA 02138

and

Teamsters Local Union #25
544 Main Street
Charlestown, MA 02129

CASE #91-519

Representing the Company

Richard MacDonald
John Kelliher, Manager, Perishable Warehouse

Representing the Union

William Carnes, Business Agent
Neal Henderson, Grievant

Witnesses

Paul Thompson
Doug Darcy
Richard Scannell
Steven Donnelly
Edward MacGillvary
Edward Egan
Barry Cryan
Paul Marion
Dennis Nagle

Arbitration held on June,12, 1991
at the Park Plaza Hotel, Boston

All Persons testifying were duly sworn:

Stipulation

Was Neal Henderson justifiably discharged?
If not what will the remedy be?

EXHIBITS

Joint Exhibit #1

Labor Agreement between Teamsters Local Union No. 25 and Star Market Company, Division of Jewel Companies, Inc. (Warehouse) Dated May 14, 1989 to May 16, 1992.

Company Exhibits:

#1 Company's position regarding the termination/discharge of Neal Henderson by Richard MacDonald

#2 Letter of Termination dated May 13, 1991

#2a A copy of Appendix D, #18, "Breaks and Free Time" dated May 30, 1990

#2b Copy of Dan Yalvucci letter to Jack Kelliher, notarized regarding his knowledge of the events of Thursday May 2, 1991, re Neal Henderson

#3 Photocopy of a statement, notarized signed by Jon Foster, inside guard on his part in the 5/2/91 evening concerning Neal Henderson

#4 Copy of a three page letter from John Gill to Jack Kelliher, notarized, on the chronology of events of the night of Thursday 5/2/91.

#5½ Copy of a letter from Frank McGovern to Jack Kelliher, notarized, giving his version of the Thursday night, 5/2/91 of his involvement in the matter of this case.

Union Exhibits:

#1 Copy of a letter headed Article 9 – Discharge

#2 Copies of the statements of Denis Provost, Bill Clark, Edward MacGillvary, Bill Crawford, Steven Donnelly, Peter Connolly, Arthur Verrochi, Douglas Darcy, George Hall, Richard Scannell.

#3 Copies of time cards of 4-6-91 of John Shehill, James J. Malone, Joseph E. Gordon, Michael Campbell and Neal Henderson and time cards dated 4-20-91 of Paul E. Babineau, Paul F. Nurian, Anthony Dinardo, Ellswor Sullivan and Neal Henderson.

#4 Copy of a requested preference sheet from Jack Kelliher to Neal Henderson.

#5 Seniority list of perishable terminal dated 2-26-91.

#6 Copy of a letter dated 3-19-91 to Mike Whelton from Nona Cusick, Manager, Grocery Warehouse.

#7 A copy of a notarized letter to "To Whom it may concern" signed by Paul D. Thompson, alternate steward dated 1-30-91

#8 Copy of page 49, Article 14, Section 3 of the current labor agreement.

#9 Appendix D, letter of understanding part 16 through part 19 of the current labor agreement.

#10 A series of eight photographs showing prints of Mandella H.Q. and Sowello on boxes and corregated sheets, etc.

XXX XXX XXX XXX XXX XXX XXX the following opening statement:

"Neal Henderson was suspended indefinitely pending further investigation Thursday evening, May 2, 1991. The investigation was completed, and based

on that investigation and a meeting with Mr. Henderson and the Business Agent, Mr. Carnes, on May 9, 1991, Neal Henderson was terminated for Dishonesty (See Exhibit #1), stealing company time, and leaving his work station without permission of Management. Exhibit #2 (termination letter) recaps what occurred at this meeting on May 9th.

Neal Henderson was observed leaving the Star Market Warehouse at approximately 8:55 P.M. Thursday evening, May 2, 1991. He had accepted a three hour overtime early start, along with ten other employees from the 10:00 P.M.-6:30 A.M. shift, and his job was to replensih picking slots for three ten selectors working in the produce and meat terminals. The overtime began at 7:00 P.M. and authorized break time was to begin at 9:25 P.M.

A safety hazard involving several pallets in the seafood/deli portion of the terminal was discovered by John Gill, Selecting Supervisor, and he went to locate Neal at about 9:00 P.M. to have Neal correct the problem. Several minutes later, Dan Salrucci, Selecting Supervisor, reported to John gill that he had observed Neal Henderson leaving the building. John had no idea why Neal had exited the building and Neal had not approached him seeking his permission. The two supervisors paged-him several times and visually checked the terminals and employee facilities and they could not locate Neal. They only found his idle forklift at the end of an aisle. During this time frame, several of the ten working selectors began to beep their horns in order to get Neal's attention to fill slots that they had depleted.

At approximately 10:55 P.M., Neal walked into a shift meeting called by Frank McGovern. Neal was due back at 10:00 P.M. for the start of his regular shift. After the meeting, Frank met with Neal and the alternative steward, Paul Thompson, and it was

at this meeting that Neal admitted he left early for break and Frank suspended him for *Dishonesty*. Neal gave no reason for his leaving, except he felt his work was caught up. This of course was not the case since selectors were calling for replenishments, and the Supervisor needed Neal to move some pallets that were a safety issue.

At the meeting held on Thursday, May 9, 1991, by Jack Kelliher, Perishable Warehouse Manager, and Bill Carnes, Business Agent, Neal revealed that he hadn't been feeling well, he needed some throat losenges and medication of some sort, plus he didn't bring a lunch from home, so he needed to get some lunch. He also stated that he had to call Bill Carnes about some issues and he couldn't reach him from the warehouse. In an added twist, Neal was trying to indicate that he was on "union business" while he was off the premises, on company time (overtime), to get cold medication and his lunch, while other employees continued to work. Neal said the store was ten minutes away, so if he had left for break at 9:25 P.M. as he should have, he would have had plenty of time to run his errands and return to the warehouse by 10:00 P.M. Jack Kelliher reiterated in this meeting that he was shocked that a steward who knows the rules, and helped negotiate the rules, would take it upon himself to leave his work station and depart the premises a full half hour before the time he was scheduled to quit for break. The termination was imposed because the company had no other choice. Neal Henderson sets the example for the rest of the workers, and flagrant dishonesty for stealing company time sets an example that could lead to several severe problems servicing Star Markets' retail stores and wholesome customers. Employees do not have a right, or an implied right, to decide themselves when they've

done enough work and when their work is finished. That is always the Supervisor's decision.

Neal, while somehow attempting to explain his actions, mentioned in the meeting held on May 9, 1991, that people are allowed to leave when their work is done. Jack Kellisher went on record as saying that under no circumstances, that he was aware of, that people working on an overtime shift prior to the start of their regular shift are allowed to leave a half hour before their scheduled break time. Neal was told that if this happened and the person was caught, they would face grave consequences.

Neal claimed that the contract gave him the right to leave his work station when he feels *his* work was done. This clause in the contract is very specific and deals with the release, by Management, of *all* the employees of a particular shift when the work of that shift is done (See Exhibit #3).

This has been consistently applied to the end of regularly scheduled shifts in the Perishable Terminal, and Management releases the employees and they punch out or have the Supervisor sign them out to end their work day. Nowhere is it said, or implied, or practiced, that a person on an overtime early start can depart the premises when the employee feels he has done enough work. There was certainly still plenty of work for the shift to do, or the company wouldn't have authorized overtime to extend the shift hours in order to meet its commitment times to its customers. The shift *ends* at 6:30 A.M. When the work of the shift is complete, Management may release them to punch out. The night of May 2, 1991, the shift worked right up until its scheduled time, and additional overtime was required beyond 6:30 A.M. *No one* was released early by Management."

"Mr. Neal Henderson
36 Waverly Street
Brockton, MA 02401

Dear Neal,

Thursday, evening, May 2, 1991, you, your alternate steward, Paul Thompson, and your Shift Supervisor, Frank McGovern, met in the office. At this meeting, Frank asked your whereabouts from approximately 8:55 P.M. until your scheduled break time of 9:25 P.M. You admitted you had left the premises to go get some lunch, even though you were supposed to be at your work station on a forklift replenshing pick slots for ten selectors in the produce and meat terminals. Frank told you that John Gill, Selecting Supervisor, had been looking for you to help correct a safety issue at about 9:00 P.M. He could not locate you and also paged you three times. Frank then told you that he had no choice but to suspend you indefinitely, pending further investigation, for *dishonesty* (stealing company time, and leaving your work station without permission of management.)

Thursday afternoon, May 9, 1991, you, your Business Agent, Bill Carnes, and Shift Supervisor, Frank McGovern, met with me in my office. At this meeting, I reported to you the results of the investigation and I asked you to tell me why you took it upon yourself to leave your work station and the premises without management permission. I opened the meeting by telling you how shocked I was that, a person who certainly knows the rules and helped negotiate the rules, would take it upon himself to break the rules.

"You told me that you hadn't been feeling well Wednesday, May 1, 1991, and it carried over into Thursday, May 2, 1991. You also told me you didn't have any throat lozenges or cold medication with you and you also didnt bring any lunch with you from home. You told me you had tried to call Bill Carnes about some issues we talked about on Wednesday, May 1, 1991, but you couldn't get through to him. You then took it upon

yourself to leave the premises and drive to a convenience store in Canton Center, even though you were still on the clock for overtime. You told me you thought you were caught up in your work, but John Gill couldn't locate you to take care of a safety hazard and a number of selectors were honking their horns looking for slot replenishments.

Based upon my investigation of the incident, and your admittance of having left the premises without management approval, I told you and Bill Carnes that a very serious violation had occurred. I told you that I had no choice but to terminate your employment with Star Market Company for stealing company time.

Sincerely,

Jack Kelliher
Manager, Perishable Warehouse
Star Market Company

cc: C. Arienti
D. MacDonald
W. Carnes, Local 25"

Mr. MacDonald read into the record part #18, Breaks and Free time of Appendix D of the labor agreement:

> "The specific contractual language on breaks and free time will prevail. There will be no more extended non contractual breaks or free time except by mutual agreement. Star hereby agrees to continue the current interim break routines in the Freezer as well as the early quit when the shift is finished in the Perishable operation."

He followed with a copy of a notarized letter from Dan Salvucci to Jack Kelliher of his version of the events of May 2, 1991, regarding Neal Henderson:

"Jack Kelliher

These are the facts as I recall them:

On Thursday, May 2, 1991, I pulled into the Star warehouse parking lot, reporting to work, and saw Neal Henderson walking in the parking lot approximately 100-150' from the grocery entrance, walking towards the other end of the lot. I looked at my watch and it was 8:57 P.M. When I passed Neal Henderson in my truck, I drove around the middle line of parked cars to find a parking spot and found a parking space about in the middle of the lot. The parking lot was about 50-60% full to capacity. By the time I got out of my truck, I saw a car leaving the lot.

Because of the fact that Wednesday, May 1, 1991, was my day off, and did not know if an overtime shift had been called, or if Neal Henderson was at the warehouse on union business, or just picking up his employee payroll check, were the reasons why I felt I did not have to stop and ask him why he was in the parking lot at that time.

"At this point, I went into the warehouse and saw John Gill on the perishable dock. I asked him if there was an early start. He said, "yes". I asked him if he knew where Neal Henderson was. He said Neal was on a forklift bid job for the early start overtime shift. I told John Gill that I saw Neal in the employee parking lot, and that I believe he might have left the property.

At this point in time, it was about 9:03 P.M., and selectors were sounding their horns because they were needing the services of a stackerman.

At this point, John and I went looking for Neal in the perishable terminal. John and I both found the forklift Neal was using unattended in the produce terminal by the large office. John Gill went off continuing to look for Neal, and I went to see if Neal had punched out on his time card. He did not. When John and I met in the office, John paged Neal to come to the office. He repeated the page three times with no response from Neal. It was now 9:12-9:15 P.M.

At about 9:20 P.M. or so, Frank McGovern reported to work. John Gill and I told Frank what had happened,

and in the discussion, the question came up if our security cameras would have it on film. I called the inside security guard and asked him if we had the cameras in our parking lot filming. He told me that they were working on the new security system and he did not know which cameras were on line, and if the one I wanted was filming. I asked him if he could check into it for me and call me back at Ext. 342. He called me back and told me he had the film of the inside of the warehouse in front of the inside guard shack and grocery entrance/exit door.

Frank McGovern had called for a shift meeting in the perishable lunchroom at 10:00 P.M. for all employees (union and non-union). Frank McGovern John Gill and I were present at the meeting with most of the union employees there at 10:00 P.M. At about 10:05 P.M. Neal Henderson came to the meeting, using the front entrance. So at this stage of the night, I saw Neal Henderson at 8:57 P.M. in the parking lot and not again until 10:05 P.M. in the perishable lunchroom.

Before the meeting, about 9:55 P.M. when Frank, John and I got upstairs into the lunchroom, Frank had passed out employee payrool checks for the employees with Wednesday night off. He had three checks left over for those employees who were out and gave them to me to give back to the inside guard for safekeeping.

After the meeting was over, the shift went downstairs and started their night work schedule and job assignments.

Frank McGovern and John Gill asked Neal Henderson to come to the upstairs office that they needed to talk. Frank told me to find Paul Thompson (alternate steward) and asked him to go upstairs to be Henderson's union representative. Paul Thompson was found and sent to the upstairs office.

When John Gill, Neal Henderson and Paul Thompson came downstairs, I took this opportunity to return the payroll checks to the inside guard. When I arrived at the guard shack to return the checks, the guard told me

he had found the time slot that I requested and if I were to wait a minute, he would show it to me. I told him that I did not have time to view it then, but to safeguard it to be viewed in the future. It was at this time, while I was inside the guard shack, that John Gill, Neal Henderson and Paul Thompson came by and saw me inside the guard shack by the viewing screens.

At this point in time it was about 10:30 P.M. I then left the guard shack and returned to the perishable terminal to continue my night's work.

Dan Salvucci"

"Sometime before 10:00 P.M., I was told by Dan Salvucci that there was a situation involving a produce employee, Neal Henderson, leaving the warehouse early.

I recall Mr. Henderson leaving the warehouse at approximately 8:55 P.M. on May 2, 1991, As he passed the guard station, I acknowledged him and said, "have a godd night," to which he responded, "You bet".

I did not know Mr. Henderson's work schedule, so I did not think it was unusual that he was exiting at this time. between 9:30 and 10:00 P.M., a large number of people entered the building for the third shift in perishable.

The next time I do recall seeing Mr. Henderson was at 10:30 P.M. when he was escorted from perishable to the front door by John Gill, a perishable supervisor.

Jon L. Foster"

"Statement from John Gill:

The chronology of events occurring on Thursday, May 2, 1991, regarding Neal Henderson is as follows to the best of my recollection. All times noted are approximate to within ten minutes in most cases, except where noted.

7:00 P.M.

The early start shift started without incident. Neal was on the floor performing the assigned work within a few minutes of the start of the shift.

7:30 P.M.

An employee reported that a small stack of pallets as left by the day shift and had tipped over and was partically blocking the first seafood aisle. I went to look at the situation and determined that it was not a serious safety hazard and could be taken care of at a later time. Since there were only three individuals in meat at the time, I made a mental note to have the situation corrected prior to the regular shift starting time of 10:00 P.M.

7:30-8:30 P.M.

I performed the functions of a supervisor on the early start. These duties included setting up the dock by pulling the pallets, etc. and assigning the doors. I also went to the grocery shipper's areas to check on the progress of the preloads for the night, as well as to the grocery office to check on the grocery transfers for the evening. In addition to this, I maintained visibility on the floor to insure that the work was being done. During this time period, I placed a sign at the time clock to inform the shift that there was a meeting at 10:00 P.M. in the upstairs lunchroom. I walked to terminals to personally inform everyone in the early start that there was a meeting at 10:00 P.M. I informed Neal Henderson of this in front of the invoice office inside the terminal during this time period. This was the last time I had occasion to converse with Neal prior to the 10:00 P.M. start of the shift.

"8:30-8:45 P.M.

I continued to perform the work of a supervisor on an early start. I did not notice Neal Henderson in the terminal, but did not have any indication that he was not there (ie: excessive blowing of horns for drops.)

8:45 P.M.

An employee again approached me regarding the pallets in the seafood room. I told him to use caution around the area and I would get Neal to take care of it prior to 10:00 P.M.

8:45-8:55 P.M.

Again I went inside the terminal to monitor the activities of the shift and once more I did not see Neal Henderson. I did not at this point believe that he was present, as once again there was no indication of this (no one calling excessively for a drop.) I do recall that there was quite a bit of selecting activity in the aisles.

9:00 P.M.

Dan Salvucci was reporting for work at this time. Dan informed me that he had seen Neal Henderson outside the building in the parking lot. Dan told me Neal had gotten into a car and left before he had a chance to say anything to him. When Dan informed me that he had seen Neal Henderson in the parking lot, he and I proceeded into the perishable terminal through the door closest to the office door. At this time, we saw the stacker that Neal was using parked across from the invoice office. At this time, Dan and I heard selectors signalling for drops with their horns. On the chance that Dan was mistaken, or that Neal Henderson had simply gotten something from his car and returned to work, I undertook a complete tour of the perishable terminal (both meat and produce and the employee facilities). I could

neither locate Neal nor another forklift that I would have believed he was using.

9:05 P.M. * (*This time I believe to be correct within one minute)

I went to the office and used the PTA system to page Neal Henderson to the office. I believe the words I used were "Neal Henderson come to the office please, Neal Henderson come to the office." I repeated the page two more times between 9:05 P.M. and 9:15 P.M.

9:20 P.M.

Frank McGovern, shift supervisor, reported for work and Dan and I informed him of the situation.

9:30-10:00 P.M.

Frank communicated with Jack Kelliher by telephone.

10:00 P.M.

We (Frank, Dan and I) went upstairs to the lunchroom to conduct the meeting that had been posted on the time clock wall. Neal Henderson was not present at the start of the meeting. As he is the shop steward, he was conspicuous in his absence.

10:00-10:10 P.M.

Neal Henderson entered the lunchroom through the front door.

10:15-10:20 P.M.

The meeting ended and Neal was informed that Frank would like to speak with him upstairs. Paul Thompson (alternate steward) was notified as well.

10:20 P.M.

Neal McGovern and Paul Thompson were into the upstairs office with Frank McGovern and myself. Since I was the supervisor on duty at the time Neal left early, I began to question him as to his whereabouts from 8:55 P.M. to 9:25 P.M. He admitted that he had left early for break, but was not sure what time it was. At this time, Frank took over to inform Neal of his decision to suspend him pending a hearing with Jack Kelliher.

10:30 P.M.

The meeting ended and I escorted Neal first to the upstairs lunchroom to change into his street clothes, and then to the grocery door. He asked if he could use the restroom before leaving and did so. Paul Thompson accompanied us during this entire time. Neal left the building without incident and I apprised the guard of the situation and instructed him that Neal was not to be let back into the warehouse.

John Gill"

"Statement from Frank McGovern:

This is what took place on Thursday, May 2, 1991. Because of the needs of the business, there was an early start this night. The early start is from 7:00 to 9:25 P.M. John Gill was the supervisor in early for the early start. On Thursday, I arrived at around 9:15 to 9:20 P.M. My first stop was at the guard office inside of the grocery warehouse. I stopped to pick up the checks for the people who were off Wednesday, and also to pick up three walkie-talkies. At that time, I walked over to the perishable office. When I went over to the office, I was met by John Gill and Dan Salvucci. This is when they told me about the problem they had. John went on to tell me that he had a problem in the seafood/deli terminal. He told me he needed a stacker to fix some pallets that were a hazard. He told me that he had been looking for

Neal Henderson, the stakerman, since around 8:45 P.M. He told me he looked upstairs in the lockeroom and on the floor. He even paged him repeatedly to the office. He never came. It was at this time that Dan Salvucci had told me what he saw. He told me that he had seen Neal Henderson leaving the building. Dan told me that he was about 150' away from the door. This was around or before 9:00 P.M. Dan was reporting to work and passed Neal in his truck. Neal was walking in the lot. Dan parked his truck and saw a car pull out of the lot. When Dan drove in, Neal had looked at Dan in his truck. They did not talk. Dan was coming and Neal was leaving. When Dan came in he was met by John Gill in the office. This is when Dan told John that he had just seen Neal Henderson leave the building. John told Dan that he had been looking for Neal since around 8:45 P.M. After hearing both sides of the story, I knew we had a serious situation. This is when I called Jack Kelliher to tell him what had happened. I called to ask him for his advice on this problem. We talked about the situation and how to handle it.

I then started the shift off at 10:00 P.M. and I had to talk about the no smoking policy. John Gill had told everyone on the early start that there was a shift meeting at 10:00 P.M. Neal was not present for the start of the shift meeting. He came up the stairs late at around 10:05 P.M. I wrapped up the meeting at about 10:15 P.M. with some questions from some of the people. We then started the shift off. I told John Gill to get Neal Henderson and Paul Thompson and to meet me in the office upstairs. This was around 10:30 P.M. At this meeting John Gill asked Neal where he had been. He also told him that he had been looking for him since about 8:45 P.M. He also said he could not find him. After looking upstairs in the lockeroom, he also paged him to the office. John said he was looking for him to take care of a problem. John asked Neal where he was. Neal said he left to go out and get some lunch.

Neal xxx xxxx xxxxx xxxxx he drove past him in the lot at around 9:00 P.M. or a little before. Neal told us he had seen Dan drive in. Neal was walking and Dan was in his truck. They did not talk at all. Then I took over with the discipline part. I told Neal because of the serious nature of the problem, I had no other choice but to suspend him pending full investigation by Jack Kelliher. I also told him the reason why he was being suspended. I told him he had accepted an early start overtime shift from 7:00 to 9:25 P.M. John was looking for him since 8:45 P.M. He was not at his work station stacking. Also, a supervisor had observed him leaving before the overtime portion of his shift had ended. This was an act of stealing company time. Neal also said he left early to go and get something to eat. He had no permission from any supervisor to leave early. He did not punch out on his time card.

Neal said he felt his work was done, and he went around to each selector to see if they were all set (whether they needed additional "drops" made). He demanded to be allowed to call Jack Kelliher. I told him he could not and I refused to give him Jack's phone number. I told him this would not change the outcome.

I asked John Gill to escort Neal off the premises.

Frank McGovern"

Mr. MacDonald stated that it was the Company's position that Neal Henderson has violated the current labor agreement by stealing time and the termination discharge was its proper course of action. The Appendix D section #18 clearly defines the conditions as to breaks and free times in the perishable operation in which Neal Henderson worked. Eleven (11) men had three hours at overtime rate prior to their start on the 10 P.M. to 6:30 A.M. shift. The break for the time worked should be from 9:30 to 10 P.M. Neal Henderson left his work station at 8:55 P.M. some 30/35 minutes before he was eligible to leave. He was knowledgeable of the rules and

is expected in the language and working to be expert of the existing labor agreement.

Mr. Bill Carnes, Business Agent of Teamsters Union Local #25, agent for this terminal stated that the position of the Union was the same as it was at the Joint Area Board hearing. He explained that Neal Henderson has been employed by the Company since October 1977, has been the Steward for this division of the warehouse for six years and is a married man for nine years. Next he presented Paul Thompson, Doug Darcy, Richard Scannell, Steven Donnelly and Edward McGillvary. In answer to Mr. Carnes' position these men testified that the Company asked for workers to work overtime prior to the start of their shift, that horns are used in certain instances to do some work with the stackers and that all of these men qualify as stackermen.

Mr. MacDonald asked if there was break time and the answer was yes. He then stated that there is contract language to cover and that leaving a half hour before time is in violation.

Jack Kelliher asked Doug Darcy if he finaished at 9:15 P.M. and his answer was "no" and that he left his station at that time to help someone finish his order.

Mr. Carnes stated that the employees help one another and when the work orders are completed it is not unusual for the employees to leave a bit early and wait for the start of their regular shift.

Mr. Carnes next called Edward Egan who said he has 25 years with the Company, works in the perishable terminal where he as a utility man he picks up pallets and does many types of work and is a qualified stackerman. He said he was not present on May 2, 1991.

Next, Barry Cryan, 21 years of employment, general warehouse man has worked as a qualified stackerman in the past and was not present on 5-21-91. Paul Marion, 3 years employment, a porter, picks up pallets, cleans lunchroom 25 minutes before use by management and employees. He stated that the 10 P.M. shift has break time at 12 midnight and at 2:00 A.M. and at 4:30 A.M.

and he cleans lunchroom and restroom. He said he has no copy of the contract and has no one tell him of the break times formerly.

Mr. Carnes questioned Neal Henderson who testified that there was a utility man and a porter present on the shift in question and that his Supervisor had directed him to pick up some pallets and he said that he would. He said that he had worked in the past as a selector and stackerman and about every job in the warehouse. That he has a perfect attendance record without discipline and has received a letter of appreciation. He said that he qualified to receive, operate a forklift, a washer and at flowers. he cited a letter to Mike Whelton for leaving early in his department and he only received a letter of reprimand. No issue was made on damaged goods in this incident and no claim of stealing time and no termination. His department is covered by the same contract.

Mr. Carnes noted that there was a confrontation regarding Martin Luter King holiday and that the Company representatives made light of it and the pictures re: Mandella, The Company claims was graffiti and not racial. The Company was to investigate the foregoing but nothing was done about it. Neal feels that he is being discriminated against and termination is too severe. The Union maintains that Neal Henderson complied with Article 14 Section 3 of the contract and with Appendix D parts 17 and 18.

Company Summation

Neal Henderson has been on Union business before and knows the rights of the Steward. In Article 3,c) the limits of the Steward are spelled out and his knowledge of them is well understood. If he needed time to call the Union he should have had the permission of the Employer. He claims the phone at the warehouse was tied up, then, why did he pass by two other phones that were not.

He did not leave the building on Union business, he says that he was sick and if so why then didn't he claim illness and get relieved from his shift.

The Union by contract cannot say he has the right to just walk off the job. What others may or may not have done has no bearing in this case.

"1) Neal is on Union business per Neal and Bill Carnes.

*He should seek supervisor's permission to stop his work and pursue grievance on company time – he did not seek permission.

*Contract says he can process grievances "on the property of the Employer – he says he was doing this off the property – in Canton.

*He says the phone was tied up so he called from off the property – yet he walked by two pay phones in the lobby that were both available. They are there specifically for the use of our employees. Why was there such urgency for Neal Henderson to contact Bill Carnes at that precise moment? In point of fact, one of the issues left unresolved from the Wednesday, May 1st meeting was some language changes proposed by the Company in writing on March 7, 1991, almost a full two months earlier. There was no dramatic urgency to any issue discussed that day. The Company had called that meeting, so none of the issues were pressing Union concerns. Neal didn't leave to use a phone – this is a lie and a cover up – a red herring.

*Is the Union saying that what the Steward did was right? That he can do this anytime *he* wants or anytime the B.A. says so? We say no!

*Is the Union saying that because *other people* claim it's alright to do what Neal did that then it's alright? This must mean it's alright for anyone or everyone to leave whenever they feel like it. That amounts to anarchy!

2) Neal was sick and had to get throat lozenges from the drug store.

*If he is too sick to work, he should call in sick – we have a disability pay program. Instead, he comes to work and then takes off from work "cause he's been sick since Wednesday" according to the Union and then he expects Star to say that's okay.

*The Company is entitled to a fair day's work for a fair day's pay (and the Union and Bill Carnes and Neal Henderson agreed with this during our last contract negotiation.) Neal didn't give us a fair day's work when he left before the shift's work was completed.

*Neal justifies his leaving work without authorization by saying he was sick and needed throat lozenges. This is justification? What do I say to all the others who want to do this? He's a man and should be responsible to bring his medication to work. For that matter, if he went to the Supervisor, we may have had what he needed on site in the medicine drawer. But no – he left.

*This "medicine" excuse is just that – an excuse to cover himself – to muddy the waters – to get sympathy – to justify his breaking the rules.

3) The Union testifies there was no horn blowing as evidence that the selectors did not need Neal's services.

*Management is responsible to manage the warehouse – not Neal Henderson or Bill Carnes or Local 25. We determine the work load and the shift schedules – when the work starts and stops.

*We've introduced our evidence from the Supervisors that there was horn blowing and that orders were handed out to selectors after Neal Henderson had left – he could not have known what the

needs of those selectors were – his work was not finished until the shift's work was finished.

*Neal, in his testimony to Jack Kelliher, claimed he actually left the floor at 8:30 P.M. in order to begin to try to contact Bill Carnes. The Company terminated him for leaving at 8:55 P.M. He has admitted leaving his work station without Supervisor approval a full 55 minutes before his scheduled time to finish his assignment.

*Neal claims if he was on days and was replenishing slots and he took it upon himself to leave, then it wouldn't be an issue. On days, the computer generates let downs, unlike produce which is all manual. If the let downs are finished, then the selectors would not need any further replenishment. There would be no "horn blowing"/In any event, Management on days would never condone leaving work early.

*The Union's witnesses at J.A.C. could not upon direct questioning swear that there was no horn blowing that night – in fact they admitted that they had sounded their horns that night because they do so every night. How convenient that they can remember that specific 30 minute period from 8:55 to 9:25 out of over 700 minutes from 7:00 P.M. to beyond 6:30 A.M. of horn blowing.

*I think those men will says what the Steward asks them or needs them to say. At the same time, you can be sure that some of the horn blowing came from selectors who wanted the Company to know that the Stackerman was missing. None of these people will come forward and admit that, but good employees don't like to see people breaking the rules and cheating the company. And people don't like to have to work when someone else is walking away from his work and making it harder for the whole shift. So whether it's jealousy or a sense of

decency, people have their way letting management know when something is wrong. And some was wrong that night.

*Whether there was horn blowing or not, and we say there was, the fact remains he admits to leaving before the shift's work was done and that's a terminable offense for dishonesty.

4) "When working an overtime early start, there is no definite time to go to break. I go to break when my overtime assignment is complete or about 9:20 P.M., whichever comes first." (Quote from Neal Henderson's testimony.")

*If Neal thinks his overtime assignment is complete at 9:20, he's close to our time of 9:25 and I think this shows he knows what time break starts.

*However, if Neal thinks his overtime assignment is complete at 8:55, or 8:25, or 8:00, or 7:30 P.M. etc, then according to his rationale, he should go to break. According to Neal, his work is done when he says so – he must be a Supervisor!

*That night, Neal says his work was done sometime prior to 8:55 instead of 9:25 when the shift stopped working. If the company doesn't take the strongest possible action, then the employees will stop working whenever they want.

*Contractually, employees are granted a 20 minute break for every two hours of overtime. For example, the early start overtime period for the 10:00 P.M. - 6:30 A.M. shift begins at 7:00 P.M. The employees are granted a 20 minute break for the first two hours, plus ten minutes for the third hour, plus five minutes travel time to the break area. This accounts for the 9:25 P.M. end of the overtime period. This three hour early start has been a practice on this shift for a number of years.

The 10:00 P.M. - 6:30 A.M. shift takes their first break at midnight, their lunch break at 2:00 A.M. and their last break at 4:30 A.M. In point of fact, the shift periodically votes to work through this last break with management's approval. If the shift employees don't know when they are to take their breaks, how can they vote and ask management's permission to work through selected breaks?

The 9:30 A.M. - 6:00 P.M. shift takes their first break at 11:30 A.M. their lunch at 1:30 P.M. and they are scheduled to take their last break at 4:00 P.M., but as a shift they voted, and were granted, the right by management to work through that last break and be released at 5:40 P.M. The 9:30 A.M. - 6:00 P.M. shift's two and one-half hour early start overtime period begins at 7:00 A.M. They are granted a 20 minute break from 7:00 A.M. - 9:00 A.M., and an additional five minute break for the period from 9:00 A.M. - 9:30 A.M., plus five minutes travel time to account for their scheduled break time of 9:00 A.M.

*The employees do know what their break times are and how they are computed.

*Again on the list of names, these men will stick together and sign whatever they are asked to sign in the name of the I.B.T.

5) The Union says that Paul Thompson, the alternate steward, says the company never communicated its break policy.

*Paul Thompson is wrong. The Company has repeatedly reinforced the language and the intent of the contract regarding breaks and free time.

*The Steward, Neal Henderson, in particular, knows how the company feels about non-contractual breaks and free time (negotiations – marathon discussions about this.)

*The early quit language in Produce is specific to the work of the shift (read that language and explain the October Labor/Management meeting and how I meant that for third shift only, but gave in that it would apply to first and second shifts also – but never to an individual as Neal Henderson is trying to say.) It always applied to the *and* of the regular shift.

*Every employee has access to a contract – they were given out to everyone and Neal Henderson can get more. It's the employees' responsibility to know his contract and to follow the rules. In addition, we've covered this issue at shift meetings and one-on-one. It has been communicated and we've been consistent in letting our employees know our expectations.

*He knows how the company feels about unproductive time. He's been involved in incidents, as Steward, where people have been disciplined, not for what Neal did, but for less severe violations such as:

–Donnelly, Auger, Thomas and Berglund left work ten minutes early at the *end* of their shift. They were suspended pending further investigation just like in Neal's case. During the course of the investigation, the Company found that there were extenuating circumstances. The work was complete and the men were all cleaning the warehouse. These men finished what they were working on and were told by other employees that the Supervisor had released the shift. They left based on that knowledge and the Company felt they were not being dishonest. In fact, several fellow Teamsters had whispered in a Supervisor's ear that several people left before the clean-up was actually complete. Upon review of the video system, these people were identified.

This also appeared to possibly be a set-up and a "bag job" to get these people in trouble, and almost cost them their jobs. The Perishable Terminal is made up of five distinct terminals within one building and Management felt it was entirely plausible that these people misunderstood and were given bad information. We reinstated them and reduced the resulting one day suspension to a warning. Neal was involved in this situation, and he is given copies of all letters of discipline. As a result of this incident, Management met with all the shifts to again clarify what the contract says about breaks and free time, and the employees clearly understood that they were not to quit work until released by Management. Break times were also discussed. Jack Kelliher, Warehouse Manager, conducted all the meetings and ended the meetings by fielding any questions so there would be no misunderstanding. All questions asked were answered and everyone understood their responsibility.

6) Time cards show employees punching out at various times.

*That night, Neal didn't punch out for the extra time he took – he just took it and expected to get away with it.

*People punch out at various time for various reasons, such as: Working through a break and/or lunch period with Supervisor's permission in order to get out earlier to go to an important meeting, engagement, etc. As Neal said, this isn't a "prison."

*Some people punch out as they leave before wash up. Some go to the lockeroom and then punch out. The contract guarantees them eight hours pay, the punch time doesn't matter. They get paid for eight hours once the Supervisor releases them. Another example is the 10:00-6:30 shift finishing at 5:00

A.M. The shift is responsible for cleaning the warehouse and once it is cleaned to the Supervisor's satisfaction, they are released. Some people punch out and leave, some go upstairs and then punch out. The point is that the time people punch out doesn't matter. We know who worked overtime and who didn't. The Company does not provide 40 time clocks for the 40 people on a shift, so there will be discrepancies in the times people punch out.

7) Complimentary note from Jack.

*This shows what a fair and good Manager Jack is . . . he communicates clearly and frequently to the Steward as well as to all around him (yet we're suppose to believe he doesn't communicate the break policy that's written in the contract.) Jack compliments people when they deserve it. This note is as much a testimony to Jack as a Manager as it is to Neal as a Steward.

*When Neal works days (which is his normal bid job), Jack sees him on a daily basis to say "hello". Jack meets with him a minimum of once a week (and often times more than that) to review any contract or operational or discipline situations. In sum, our Management is up close and hands on and ***strong*** on communications.

*Relative to this note from Jack . . . Neal did a noticeably good job for a few nights and Jack was right there with a 'pat-on-the-back.' Does this look like a Manager who's out to "get" Neal Henderson as the Union says? No way!

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first offense.

*It's a first offense if you consider it's the first time we've caught him going out the door before the shift's work is done.

*In point of fact, contrary to what the Union has presented, he does *not* have a clean record of discipline. He's received Final Warnings in the past for attendance (May 3, 1983) and a Written Warning for job performance (January 20, 1983), plus a Final Warning for job preformance (October 12, 1983). This is certainly not a clean record.

9) The Union says 'what's the big deal that Neal was gone early . . . there were other qualified stackerman if the Company needed some work done.'

*That's a great way to look at it. It's okay for Neal Henderson to leave early because the Company can always tell a Selector to stop doing his job and do Neal's job because Neal chose to leave early to get lunch and cold medicine.

*The point is . . . Neal alone was the Stockerman by seniority on that shift. He chose the work and was obliged to stay with it. And the other men all had their own work and they did it right up to the 9:25 P.M. break time – all except Neal.

*We will never excuse one employee's action like this and dump that work on someone else. We spent overtime that night to handle the work – we had 11 men including Neal in three hours early on overtime before the 10:00 P.M. to 6:30 A.M. shift started, and then still had to work people on overtime beyond 6:30 A.M. to finish the job – there was *no* early quit – except in Neal's mind.

10) The Union says that Mike Whelton's violation was handled differently than Neal Henderson's violation.

*This is so because they are two totally different situations.

*No supervision in building.

*His job was slot moves – he had a defined list of moves to accomplish – he had accomplished all assigned work.

*Only other employees in building were there doing let-downs and two doing cherry pick – no selectors.

*His work had no inter-relationship with any other employees in the building.

*Supervision had always said if you accomplished 54 let downs on four hours overtime you were done. So he assumed since he had completed his assigned task he was done.

*He had no way to know what other work was available.

*This Mike Whelton violation issue is a smokescreen.

11) The Union says there may be a hidden agenda here and says this termination is racially motivated.

*Paul Henderson's charge was brought to our then Company President, Marty Scholtens, by Neal Henderson. Our President told Neal to bring it to me and he did. I handled the investigation and found there was no racial discrimination on the part of the Supervisor. I've been with Star for 26 years, most of those years in a Manager/Leadership role. In my prior job as Vice President of Human Resources, I investigated and handled various types of cases of alleged discrimination (i.e., racial, sexual, age, etc.) I'm trained, experienced and capable in this area and there was no discrimination from Frank McGovern or anyone else in Supervision. There were indications that fellow employees to Neal had spoken and written

harassing things over the years which Neal claimed the Company had overlooked, yet he was not able to substantiate his claims.

*Neal was not satisfied with my findings in the Paul Thompson situation, but that doesn't mean the findings were wrong. In point of fact, Neal would not have been happy with any finding that didn't match what he wanted. In his opinion, the Supervisor was guilty and he wanted the Supervisor gone. And he himself told me that before the investigation was even conducted.

*Neal told me he intended to pursue the allegation further through outside agencies, but in point of fact, there was no further investigation by outside agencies because there was no wrong doing.

*I abhor discrimination of any kind and have fought to stamp it out during my entire professional career. Star Market Company and Star Management have the highest possible regard for fair treatment and our reputation is unblemished in this area.

12) The Union shows pictures of graffiti as alleged evidence of racial discrimination.

*The Company was shocked at the Union's allegation and action. No one is allowed to take pictures in Star facilities without our approval — and this was done without our knowledge and consent (if these really are Star pictures and I don't know that for a fact.) I objected to these pictures at J.A.C. and I object again here.

*The B.A. knows that permission is required because he asked once before on a different matter if he could take pictures or a video in the building and he was told no.

*If this graffiti is really there, than why was this done clandestinely? Why still isn't it pointed out to management to correct it as we certainly would?

*There's certainly the possibility that someone put the graffiti there for the express purpose of these photo's and this arbitration.

*At J.A.C., Neal Henderson claimed he told me once about some such graffiti ("Toby"), and that I suggested he clean it off (as if I was out of order.) What he failed to mention was that he was the bid porter when he told me this and that's a porter's job to remove graffiti. So I was perfectly in order. I told him such graffiti was totally unacceptable to me and he should as the porter remove it. I also told him that if he felt it was too sensitive an issue for him to remove graffiti that he felt was directed at him, he should notify his Supervisor and the Supervisor would direct another porter to do the job.

*About two weeks prior to Neal's arbitration at J.A.C. or on or about May 8, 1991, Joe Santos (a Black selector on the day shift) complained to Jack Kelliher about a racial slur that had just been written on the lunchroom bulletin board. Jack, Joe and his Supervisor, Bob Frasca, went up to the lunchroom to see the graffiti. "Toby Sucks" had been written on the newly painted bulletin board. Jack told Joe he did *not* condone this ridiculous childish act and he apologized to Joe. Joe said it wasn't management's fault and he put the blame on a couple of his fellow Teamsters. He wouldn't give Jack any names. Jack told him if he saw any examples of racial graffiti anywhere in the warehouse to immediately report it and Jack would have it removed. The porter was instructed to immediately remove the offending statement and Joe never got back to a Supervisor or Jack Kelliher

with any other examples of racial graffiti within the Perishable Terminal.

*Neal told me himself that his fellow employees had written and spoken racial remarks over the years but he said he wouldn't name names. I assured him that the kind of behavior he described was unacceptable to me and to Star Management, and I asked him to work with us on solving any problems that arose. Clandestine picture taking of alleged racial graffiti was not what I had in mind. In point of fact, Star Market Company has always been an Equal Opportunity Employer. According to State Labor statistics, out of the over three million workers in the labor force, 2.9% are black. At our warehouse 4.5% are black. We also have many other minority groups well represented in our workforce.

*There simply is no racial issue going on here in this discharge. The Union knew that from the beginning because the Union knows that Star won't tolerate any discrimination. The Union did not protest this discharge in their filing as a violation of Article 2 – Discrimination. *No!* They filed their case as a violation of Article 9 Discharge. If they thought the discharge was based on discrimination, they would have filed this under Article 2. The fact that they didn't proves that this "hidden agenda" allegation is a smokescreen – a last ditch effort to try to save Neal's job because he knows he did wrong.

13) The Union also says that Neal is receiving unfair treatment in this discharge because he is the Steward and because he is an elected Delegate – that we are trying to make an example of him.

*This is not true.

*Because he is the Steward and has participated in numerous contract negotiations and numerous contract and discipline issues, there is no doubt in the Company's mind that Neal Henderson knows the rules. He is the single most knowledgeable Teamster in that Warehouse when it comes to the contract, the rules, the policies. He himself *admits* he knows the Company's position on non-contractual free time and unauthorized breaks – he was there at negotiations when we discussed this issue for months and we abolished them. He knows that and he Himself *admits* he left his job before the shift's work was done.

*How can the Company not discharge a person who so grossly abuses the contract he is suppose to uphold?

*He was not discharged because he was the Steward or because he is an elected Delegate. That's none of our business. But as a Steward, he is supposed to set an example for his fellow employees. I would think if any one would show responsibility and leadership, it would be the Steward. If anyone deserves the trust and respect of Management, it should be the Steward,. If anyone won't break the rules or screw the Company or screw his Supervisor, it should be the Steward we can trust to be responsible.

*Let's keep our eye on the issue here – it's not his color or his union position or anything else – the issue is – he knew the contract – he negotiated it – he broke the contract. By contract, dishonesty is a cardinal sin – discharge is the remedy. Neal has to be held accountable for his actions.

14) Let's review Exhibit 39 that the Union has submitted.

*Read paragraph (d) and emphasize 'work continues until relieved from duty.'

*Read paragraph (e) and explain the:

20 minutes first two O.T. hours

10 minutes add'l. 1 hour O.T.

5 minutes wash up

35 minutes – 9:25 end of work on 7:00 P.M. – 10:00 P.M. O.T.

15) Let's review Exhibit #10 that the Union has submitted.

*Read item #18 *Break* and *Free Time.*

*This is new language put into the 1989 contract. We abolished all past practices of non-contractual breaks – Neal Henderson negotiated this agreement. We expect him to live by it.

*I'm reminded of a labor relations meeting held shortly after contract ratification – Neal and Bill were there. (Oct. 89)

*I announced that given this new language, we would put in a buzzer/bell system so there would be no confusion about the correct times for breaks and meal periods. The Union went 'nuts' – "we know the break times; treat us like men not school children; you the break issue in the contract and we'll abide by the rules." This was promised by Neal and Bill, and now they claim they don't know the proper break times. Not so.

*Well, I relented for the sake of morale and didn't put the bell system in. But I warned the Union Committee that there better not be any abuse – no more non-contractual free time – I expected 100% compliance with the contract on this issue. The Union Committee (including Neal and Bill)

assured me they would abide by the contract and would insure that their membership understood that."

The Employer recognizes the right of the Union to designate the job stewards and alternates from the Employer's seniority list, but limited to such number of individuals as mutually agreed to by the Union and the Company.

The authority of job stewards and alternates, so designed by the Union shall be limited to and shall not exceed the following duties and activities:

(a) The investigation and presentation of grievances to his Employer or the designated Company representative in accordance with the provisions of the collective bargaining agreement.

(b) The collection of dues when authorized by appropriate Local Union action.

(c) The transmission of such messages and information which shall originate with, and are authorized by the local union, or its officers, provided such messages and information:

1. Have been reduced to writing, or

2. If not reduced to writing, are of a routine nature and do not involve work stoppage, slowdowns, refusal to handle goods, or any other interference with the Employer's place of business; provided, however, that the activities referred to in (a), (b) and (c) shall not be performed in such fashions as to unreasonably conflict with the steward's work duties.

Job stewards and alternates have no authority to take strike action, or any other action interrupting the Employer's business, except as authorized by official action of the Union.

The Employer recognizes these limitations upon the authority of job stewards and their alternates, and shall

not hold the union liable for any unauthorized acts. The Employer in so recognizing such limitations shall have the authority to impose proper discipline, including discharge, in the event the shop steward has taken unauthorized strike action, slowdown or work stoppage in violation of this Agreement.

Stewards shall be permitted to investigate, present and process grievances on the property of the Employer without loss of time or pay (not in Canton). Such time spent in handling grievances shall be considered working hours in computing daily and/or weekly overtime. In the absence of the steward, a July authorized alternate steward shall be recognized by the Employer as having the authority of a steward.

Only stewards shall be granted superseniority for all purposes including layoff.

He left his work duties without authorization of his supervisor in absolute violation of the contract.

Neal Henderson, for his own personal reasons, took it upon himself to leave the company premises rather than stay at his work station and do his job until his scheduled break time. The company finds this to be a deliberate act of dishonesty for stealing company time and leaving his work station without the approval of Management. The company asks the Board to uphold the termination of Neal Henderson.

Union Summation

In the past the Company has allowed the Steward to conduct Union business and has had no spelled out policy. Bill Carnes was expecting to hear from Neal. This Union has never condoned stealing time. The Company in the past has allowed early breaks. Neal has been commended for his job performance. He was on the Union negotiating team. He was on free time, had no problems leaving early to talk over negotiation conditions and intent. There is no change from the old contract on leaving early. Neal gives a fair days work. He

left early to get medicine and to call his Union representative. He did get through on the phone, picked up his medicine and returned. His work was completed. Supervisor saw him leave and did not make an issue at the time. Twenty-four employees came to testify for him. Each shift knows when break occurs. There is no written instruction by the Company in this regard. The Employees are consistent with practices; the Company is not. Whelton had same problem; no discharge given. Pictures show graffiti company uninterested. The Article 9 discharge application is unjust. The buzzer-bell systems would have created a problem. Free time, unauthorized breaks and the like could be a problem at other terminals but not here. Early finish is the real problem; the produce employees know the policy. Neal has done nothing to merit termination. The Company has the obligation to apply fair play. Neal was on Union business; he has never abused his office of Steward. He never intended to violate Company policy. Had no idea of his being wrong on May 2, 1991. Neal knows the contract; no where does it show dishonesty or theft of time. The Union asks that its position be upheld and that Neal Henderson be returned to work and that lost wages and overtime lost, as well as pension, health and welfare benefits be paid to him upon his return to work.

Neal Henderson was asked if he had further comments to make and he made the following:

"There are 3 reasons why we are hearing this case today Mr. Doherty. Star Market has unjustly fired Neal Henderson because he is black and has complained about racial graffiti and comments which Star chose to ignore, allow and condone. He is also a union activist who has been a successful shop steward for over 5 years. He also recently won Local 25's delegate election beating incumbent officers and agent one of which is the Co-Secretary of the grievance panels and endorsed by the General President Bill McCarthy. Star was well aware of the anomosity because of a notice posted summizing a debate in April at the Local's general

meeting. Neal has since then filed a protest with the court appointed Election Officer who will scrutinize the remedy to ensure it doesn't violate the 'Consent Decree' enter into between the International Teamsters and the Federal Justice Department.

"I have been discharged for dishonesty (stealing company time, and leaving my work station without permission of management) Dishonesty? The first time I was asked by management, I told them the truth and never deviated from it. I didn't make up a story and then chnage like so many employees and supervisors have done. When I left I didn't sneak out another exit. I walked right into the plain view of Star's high tech surveillance cameras, a security guard and a supervisor that I was going to work with the rest of the night. I also rode by another camera and through a gate with another security guard. I didn't lie or sneak.

Stealing company time? Star is a company that literally pays their employees 40 hours pay for 30 hours work in the Perishable Department. Star has even paid perishable employees overtime and straight time simultaneously and still let them go home before they completed their straight time not overtime. Even on the night in question when there was allegedly so much work that Star claimed no one left early and could not service their stores on time. Now they have the audacity to ask you Mr. Doherty to uphold my discharge for stealing one half hour when I was caught up and mixing union business with break time.

"Leaving my work station without permission of management. Perishable management has been permitting this since I have work there which is 1977. If I had any inclination that I was going to be disciplined after being seen by my supervisor wouldn't I have asked or returned to work? Yes, of course, but I wasn't the only one who left early, I wasn't even the first one to leave that night and their surveilance tapes prove it. Mike Whelton left his work station without a supervisor in the building and all his letter refers to is his job performance

not *dishonesty*. I have a letter of appreciation from the manager of perishable for my performance and I also have perfect attendance. The fact is no one has suffered any monetary loss but yet I'm discharged!

"I wasn't stealing company time because I was caught up and would have been conducting union business on the telephone had I gotten through to my Business Agent. One of the issues we were to discuss was how Star wanted to eliminate my job and give it to another employee, who suffered a stroke, without posting a job bid. I guess Star figures that discharging me would make that issue go away!

"Dishonesty is such a broad term and if it was taken to an extreme then all of us would be discharged because there are many agreements made at negotiations that are not adhered to in practice. Such as Dick MacDonald assuring us he would build a better rapport with labor, but he hasn't even had one quarterly labor management meeting as per the contract. Jack said he would give me a master seniority list with everyone's qualifications as per the contract. Everyone is to punch his own time card before and after work and lunch as per the contract.

"They waited for the right time to fire me which was right after the "Sour Grapes" notice that summized my open debate with local officers at the local meeting in April. This is Star's best shot to get rid of the black union activists who recently defeated some of his local's officers and agents for International Delegate.

"Dick MacDonald claims that he is contractually obligated to discharge me for breaking a cardinal sin (dishonesty) but yet they have not in the past. The law recognizes the difference between larceny and grand larceny and administers sentences accordingly not arbitrarily and capriciously.

"For example Mike Picco has been in three fights at Star and is still employed even though assualt or battery justifies a discharge for the first offense.

"Leo Gilbert and Joe Monshan have received hundreds of extra dollars in their checks and they cashed them. They weren't fired they were just told to pay it back in time.

"Ed Egan was seen by a Star planted employee eating grapes and cherries. He was a union activist and was fired but reinstated and made whole for all losses!

"Star was allowing employees to go through the practice of minor contractual violations. Then comes the right person at the right time and they go straight to a discharge.

"Take Star's Exhibit #3 *Breaks and Free Time* #18. It states that extended breaks and free time aren't allowed unless mutually agreed upon. How do we prove that there was an agreement in practice when it isn't reduced to writing? The practice was when we finished out overtime assignment we could break until our straight time started. A lot of times I utilized this time to conducting union business. The main reason for this company proposal was that Star wanted to stop the grocery unofficial breaks for nonselectors. The practice was that everyone took the bi-hourly breaks and the non-selectors took their hourly breaks, which wasn't consistent in other departments. After negotiations, Dick denied the early quit language for Perishable. Star's attorney proved Dick wrong with a comparison of the proposal and the final offer. Later the attorney was fired!

"Dick claims that I have discipline letters but failed to produce them. Discipline letters are in effect for nine months contractually. As shop steward for over five years I file all the letters and I know there isn't one for me.

"Dick claims that the supervisors don't come in at 9 P.M. when in fact they come in to set up for us. And the supervisors and security guards don't know when there is overtime or when we go on break for overtime. Supervisors know where there people should be and he (Dan Salvucci) is my supervisor and we saw each other

when I left and we will see each other when I return. If it was unusual Dan would've said something, but it wasn't. The guard sees us leaving at different times all the time so of course he didn't find it unusual.

"I never denied leaving so Dick didn't try to prove I left by showing the tape. I was never offered by Star to view the tape because they knew that others left before and after me and that I didn't leave in my car.

"Dick claims that we were working in 5 rooms but the truth is the eleven of us were working in three rooms plus the loading dock of course where I'm not needed.

"Dick claims that there is a ten minute break clause for each hour of overtime in our contract. On page 49 it states that there is a 20 minute break before each two hours of overtime. We choose when to take it before or after work throughout the warehouse which is done differently. My shift works first so the trailers can be moved before the start of straight time. Dick is confusing regular breaks with overtime breaks from different shifts and departments. We have liberal breaks and are taken in accordance to our work assignments. I've worked through breaks and have taken long breaks and I've never asked the supervisor's permission to do union business when my work is caught up because I get both jobs done.

"The witnesses who showed up to testify did corroborate verbally when asked and if not in writing that there were not horns blowing to get my attention after 8:30-8:45 P.M. to replenish slots. If they were blowing horns to alert management that I was missing why do they unanimously deny it happened, because it didn't. I can't fire them if they don't lie for me but Dick can fire supervisors and guards for not doing what he tells them to do.

"Dick claims that I was dishonest because I didn't punch out for that break. No one does for breaks and, some don't when they go home like the four guys that were suspended for leaving early. Jack rescinded the

letter of suspension in writing and never mentioned that they were allegedly mislead by brother employees. First Dick says that 15 minutes is too much then he says that 45 minutes is nothing because they have to change their jackets but my half hour justifies a discharge.

"The letter of appreciation from Jack was because the meat inspector on days mentioned that there was a substantial improvement in the way the meat room was left for the day shift. He made it a point to ask Jack who it is was to thank.

"After finding out that Frank McGovern referred to Martin Luther King Holiday as nigger day I only asked that he be transferred not discharged, as Dick implied. Then Dick told the grievance panel that the pictures of the graffiti wasn't of Star but later had it removed. He also never said to me to tell the supervisor where the graffiti was. Dick never mentioned it again after he asked why I never removed it myself as a porter. I told Dick that no supervisor told me to and if I do it on my own then the culprits will know it bothers me and will only do it more. Bill filed my discharge case under Article 9 only because he was in a rush because he thought that the day he found out was the deadline.

"Perishable didn't want a bell rung for break because they were six starting times and we wouldn't know what shift it was for and it would've been annoying. Besides I was on an overtime break and there was no mention of including the overtime breaks. We never claimed we didn't know when the break time were, although some didn't know, but that the practice of us taking long breaks is consistently allowed on overtime especially on perishable.

Dick claims if I'm reinstated that it will be okay to do anything. The logic behind this is that I'm the steward and I'm not privy to bending the contractual rules. Why can't Star implement the rules consistently not arbitrarily and capriciously so everyone knows what can and cannot be done.

"Supervisors and security guards have been coerced by Dick to lie for management. One security guard has been fired because he wouldn't sign an affidavit that Dick fabricated to get someone else fired. Some refer to Dick as the Lorenzo of the grocery business.

"Recently Dick hired Gagnon to do a time study so job performance would increase. Gagnon made a lot of suggestions in grocery but only a few were implemented. When they got to perishable and saw the operation they told Star that they can't do their calculations when employees take long breaks and go home early. In grocery you can finish up yesterday's work or start on tomorrow work but in perishable, today's work has to be done today, so that's why we can leave and grocery can't.

"The bottom line comes down to this. If the discharge article of the contract is the deciding factor only than I'm wrong and should be disciplined, not fired. Dishonesty should be considered in levels of severity such as the law does with larceny vs grand larceny and armed robbery vs pilferage. On the other hand if the deciding factor is the past practice article of the contract than I have only done what everyone else is allowed to do is perishable.

"While working on days I recall hearing employees being paged for phone calls and never answer the page. When they came back they were just given the message and returned to work. Dick has put in days of preparation to get rid of me and ruin my family's life because of the right timing. This never should have gone this far and I should be reinstated to the seniority list and suffer no monetary loss. If I had gotten through to Bill Carnee on the phone in the lunchroom and John asked me to pick up the pallets I would've asked one of the other guys to pick them up so I could finish. Either way Star didn't suffer any loss.

Thank you, Neal J. Henderson"

Mr. Henderson was asked if he felt that he was properly represented by the Union at this hearing and he stated that he felt that he was.

Findings

Neal Henderson was working on an early start overtime on the 7 P.M. to 9:25 P.M. on the evening of May 2, 1991. The contract calls for work from 7 P.M. to 9:25 P.M. with a break of 20 minutes for the first two hours and an additional break of 10 minutes for the third hour plus a five minute break for travel time to the break area. That is for the early start overtime for three hours pay at the overtime rate; the actual working time is two hours and twenty five minutes. The thirty five minutes time between 9:25 P.M. and 10 P.M., which is the start of the regular shift is break time for the three hour early start and is in effect a rest period prior to the start of the regular shift.

In Appendix D, Section 18, "Breaks and Free Time"; The specific contractual language on breaks and free time will prevail. There will be no more extended non contractual breaks or free time except by mutual agreement. Star hereby agrees to continue the current interim break routine in the Freezer as well as the early quit when the shift is finished in the Perishable operation."

In the incident the shift was not finished. No mutual agreement was made. There was several hours of testimony at this Arbitration both sides presented their best arguments. Witnesses were sworn and heard. Notarized statements were read into the record. But, in the end, the Stipulation to be answered is, was the discharge of Neal Henderson justifiable? The record shows that Mr. Henderson, by his own testimony, stated that he left his work area in plain view of everyone, went past the security guard, went through surveilance cameras and past a supervisor. He was on his way to get medicine, to pick up a sandwich and to make a phone call to Bill Carne his Business Agent. He poses the question if he

was stealing time, intentionally, would this be the way a person would do it?

Now, the Company questions why leave his work place because there were other telephones other than the one in use; there is medicine available for the asking and there is the supervisor to ask for permission to leave the work place. In considering all the testimony presented both pertinent and non-pertinent to this case, the Arbitrator is limited to interpreting the current Labor Agreement and must follow the language of the Agreement.

It is therefore my finding and award that the language of the Agreement and Appendix thereto is not ambiguous; that it means exactly what is says, and that nothing has occurred locally warranting the Arbitrator to modify the terms and intent of the contract.

AWARD

The Arbitrator finds that Neal Henderson was justifiably discharged on May 2, 1991. Accordingly, the award of the Arbitrator is that the grievance of the Union submitted to arbitration be and is hereby denied.

It follows that no wages or benefits are due him after the date of discharge.

It is so ordered.

/s/

William G. Doherty
Arbitrator

July 17, 1991

BEFORE FREDERICK B. LACEY,
INDEPENDENT ADMINISTRATOR

In re:	)	
	)	
NEAL HENDERSON	)	
	)	
and	)	
	)	
STAR MARKET	)	No. P-760-LU25-ENG
	)	
and	)	
	)	
IBT LOCAL UNION NO. 25	)	

ELECTION OFFICER SUMMARY

I. NATURE OF PROTEST

This protest, arising under Article VIII §10 of the *Rules for the IBT International Union Delegate and Officer Election,* revised August 1, 1990 ("*Rules*") challenges the discharge of an IBT member from his employment.

II. CONTENTIONS OF THE PARTIES

Protestor Neal Henderson alleges that he was discharged on May 2, 1991 by Star Market in retaliation for his participation in the delegate and International officer election processes protected by the *Rules.*

Star Market contends that the discharge was for cause pursuant to the provisions of the collective bargaining agreement between Star Market and the IBT in that Mr. Henderson committed an act of dishonesty. Star Market further contends that the determination of

the Election Officer was contrary to the evidence presented.[1]

III. NATURE OF THE INVESTIGATION

This protest was investigated by the Washington, D.C. Office of the Election Officer.

IV. FINDINGS OF FACT

1. Protestor Neal Henderson has been employed by Star Market since October, 1977. He is a member of IBT Local Union 25. He has been a Union steward for Local Union 25 at Star Market since approximately 1986. At the time of his discharge Mr. Henderson was employed by Star Market as a warehouseman in the perishable department.

2. Mr. Henderson was a successful candidate for delegate to the IBT International Union Convention from Local Union 25. He sought such position on a slate committed to the candidacy of Ron Carey for General President. He and his slate were opposed by the McCarthy/Rank and File Slate.[2] William J. McCarthy and the only winning delegate candidate on his slate, Frank Hackett, support the candidacy of R. V. Durham for IBT General President. Mr. Hackett is seeking an IBT Vice President position as a member of the R. V. Durham Unity Team slate. From time to time Star

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1. By letter dated May 14, 1991, the Election Officer deferred this protest pending the processing of a discharge grievance filed under the collective bargaining agreement. The Election Officer noted that he would consider the protest after the grievance procedure had concluded, including a review of the representation afforded Mr. Henderson by the Union on the grievance. The Election Officer found that the Union had fairly represented Mr. Henderson; no appeal has been taken from that decision.

2. There were actually three slates competing in the Local 25 delegate election. The McCarthy/Rank and File slate was a full slate; the other two slates each fielded only half of the number of delegates eligible to be elected.

supervisory employees have made remarks to Mr. Henderson which could be considered disparaging of his candidacy for delegate or disparaging of his other campaign activities. For instance when Mr. Henderson, prior to his election as delegate, applied to take his vacation during the week of the 1991 IBT International Union Convention, he was asked by his supervisor, "Aren't you being a little overconfident?" Certain supervisory employees also made remarks to Mr. Henderson suggesting that Mr. Carey could not be elected.

3. Subsequent to his election as a delegate, Mr. Henderson continued to engage in campaign activities supporting Mr. Carey's candidacy and critical of the other candidates for IBT General President and the Local 25 officers who support such other candidates. He has engaged in such campaign activities openly at his place of employment. His supervisors were and are aware of his activities and the nature of his intra-Union political positions; they are aware that Local 25's officers have opposing political views.

4. On May 2, 1991, Mr. Henderson was scheduled to work a regular shift beginning at 10:00 p.m. He also accepted an overtime assignment to begin prior to his shift. Ten (10) other employees also worked this early overtime shift. The overtime assignment began at 7:00 p.m. When working pre-shift overtime, Star employees are entitled to a rest period or break at the end of the overtime shift, but prior to the start of their regular shift. Employees of Star Market are not required to punch in and out on their time cards except at the beginning and end of their shift and for meal periods. (Collective Bargaining Agreement at Article 14 §4) Employees at Star Market are allowed to leave the premises during their rest periods without requesting permission from supervisory personnel.

5. On May 2, 1991 Mr. Henderson left his work station prior to the completion of his overtime shift and at a time when some employees on the overtime shift

had not completed their work in the perishable department. Mr. Henderson had completed his work assignment at or about 9:00 p.m. and, after checking with his fellow employees whether his services would be needed, left the plant. Mr. Henderson contends that his reason for leaving the plant was to purchase some cold medication, purchase lunch and contact a Local 25 Business Agent concerning meetings held with the company on a prior day.

6. On the date in question, May 2, 1991, during the early overtime shift Mr. Henderson had the assignment of stackerman. This entailed the operation of a fork-lift truck. The ten (10) other employees who work that shift in the perishable department submitted statements stating that there was no difficulty with the stackerman, Neal Henderson, quitting his work on that night and that there was no continuous "beeping" for a stackerman and no interruption in work flow due to the stackerman not being present at and after 9:00 p.m.

7. John Gill, the Star Market supervisor in charge of the early overtime shift on May 2, 1991, states that he had work for Mr. Henderson after 9:00 p.m., specifically, the removal of some pallets which were partially blocking an aisle in the perishable department. At approximately 7:45 p.m. on May 2, 1991, another Star Market employee working the early overtime shift, William Crawford, requested Mr. Gill to have some pallets that had been left in an aisle removed. Mr. Crawford requested that a porter, whose duties it would normally be to remove such pallets, be assigned the task. Mr. Gill viewed the situation, determined that a small stack of pallets had tipped over partially blocking an aisle, and decided that it was not a serious safety hazard and could be taken care of at a later time. At 8:45 p.m. on that date Mr. Gill was again approached by Mr. Crawford regarding these pallets. Mr. Gill advised Mr. Crawford that he should use caution and that the problem would taken care of. Mr. Crawford stated that at approximately 9:00

p.m. when he left his work station to take an early break in the company lunch room, the pallets had not yet been moved.

8. Mr. Gill states that after being advised the second time about the pallet situation, he began looking for Mr. Henderson to remove the pallets. At approximately 9:00 p.m. Dan Salvacci, another supervisor for Star Market, was reporting for work. He saw Neal Henderson outside the building in the parking lot. Mr. Salvacci advised Mr. Gill of this and Mr. Gill then toured the building to determine whether or not Mr. Henderson was present. At approximately 9:05 p.m. Mr. Gill went to the office and used the PA system to page Mr. Henderson. Mr. Gill claims that other perishable department employees were working at this time and Mr. Henderson's services were required.

9. On May 2, 1991 it was the practice of employees of the perishable department who were working pre-shift overtime to leave early for their break if their work was completed. They left work for their break prior to the start of the "regular" break period and prior to being released by supervisory employees.

10. John Darcey, an employee of Star Market assigned to the perishable division, was also working the early overtime shift with Mr. Henderson on May 2, 1991. Mr. Darcey took an early break at approximately 8:55 p.m. without asking permission from his supervisor. He stated that most of the other employees working the overtime shift took an early break at approximately that same time on that date. Other Star employees working that overtime shift confirmed that they had taken early breaks on May 2, 1991. Mr. Crawford also stated that a majority of the employees who worked on the overtime shift took an early break and were in the company lunch room with him at about 9:00 p.m. Neither Mr. Darcey, Mr. Crawford nor any employee other than Mr. Henderson were verbally warned or disciplined for taking an early break.

11. Mr. Henderson returned to the plant at approximately 10:00 p.m. He entered the lunchroom where a shift meeting was in progress. After the shift meeting was completed the supervisors requested to speak with Mr. Henderson and at that time suspended him pending investigation.

12. By letter dated May 13, 1991, Jack Kelleher, manager of the perishable warehouse for Star Market advised Mr. Henderson in writing that his employment was terminated for dishonesty, stealing company time.

13. Prior to May 2, 1991 other employees for Star Market have been disciplined for leaving their workstations and/or for taking early breaks, but none have been terminated for a first offence:

a. In July, 1990 four (4) employees left their workstations approximately fifteen (15) minutes prior to the shift being release by the supervisors. All four (4) employees were initially given a one day suspension that was later reduced to a verbal warning.

b. In August, 1990 an employee was found in the upstairs breakroom playing pool at a time when he was supposed to be in the warehouse working. The employee disobeyed direct instructions from a supervisor to return to work and became verbally abusive to the supervisor. The employee also threw a cue ball down on the table, which ball hit another ball and ended up striking the supervisor in the arm. That employee received a twenty (20) day suspension.

c. On March 19, 1991 another employee was disciplined for leaving the premises prior to his overtime shift being completed. In his rush to leave early, he damaged two cases of produce, leaving them for someone else to clean-up. That employee received a warning letter.

d. In June, 1989 another employee received a four-and-one-half (4½) day suspension for unauthorized departure from the workplace. That employee had received prior warnings for attendance and unauthorized departure.

e. In January, 1990 another employee received a three-day suspension for leaving his workstation early for his break and never returning to complete his shift or contacting the company regarding his failure to return.

14. Pursuant to the grievance procedures set forth in the collective bargaining agreement, the discharge determination of Mr. Henderson was the subject of an arbitration which was held on June 12, 1991 before Arbitrator William G. Dougherty.

15. At the arbitration hearing the company contended that the discharge of Mr. Henderson was justified based upon the clear language of the collective bargaining agreement prohibiting extension of the break periods except by mutual agreement. (Appendix D, Paragraph 18 of the collective bargaining agreement) The company stated to the arbitrator:

> "[A]s a Steward he is supposed to set an example for his fellow employees. I would think if anyone would show responsibility and leadership, it would be the Steward. If anyone deserves the trust and respect of Management, it should be the Steward. If anyone won't break the rules or screw the Company or screw his supervisor, it should be the Steward we can trust to be responsible."

16. Subsequent to the arbitration proceeding Star Market posted a memo dated June 19, 1991 with respect to break times in the perishable department noting, "[t]hat certain shifts are somehow unsure of the times they are to go to break." The requirements of the memo, which merely restated the provisions of Appendix D, Paragraph 18 of the collective bargaining agreement

with specific time illustration, were not immediately effective since, as the memo stated, "there are a couple of changes."

17. After his discharge, Mr. Henderson sought unemployment compensation from the Commonwealth of Massachusetts. The decision of the Department of Employment and Training of Commonwealth of Massachusetts was issued after the arbitration proceeding concerning Mr. Henderson's discharge grievance was completed. In its decision determining Mr. Henderson's eligibility for unemployment compensation benefits, the Department found that Mr. Henderson's discharge "was not attributable solely to deliberate misconduct and wilful disregard of the employing unit's interest." The Department found that prior to Mr. Henderson's discharge "it was not unusual for employees to take their work breaks when they completed their overtime assignments."

18. On July 17, 1991 the Arbitrator issued an award finding that Neal Henderson was justifiably discharged on May 2, 1991 and denying the grievance. The arbitrator in his decision relied solely upon the terms of the collective bargaining agreement: "[i]t is therefore my finding and award that the language of the agreement and appendix thereto is not ambiguous; that it means exactly what is [sic] says, and nothing has occurred legally warranting the Arbitrator to modify the terms and intent of the contract."

19. At the time of his dismissal, Mr. Henderson filed a protest with the Election Office. The protest was deferred until the grievance and arbitration process had been completed. Upon completion of the grievance and arbitration procedure the Election Officer determined the merits of the protest.[3]

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3. As noted previously, see footnote 1 *infra,* the Election Officer also reviewed the nature of the representation afforded Mr. Henderson by the Union. The Election Officer found the Union fairly represented Mr. Henderson.

V. CONCLUSIONS OF LAW

A. Jurisdiction

1. Article VIII §1(c) of the *Rules* guarantees the right of all IBT members to support candidates and participate in campaigning activities free from interference, restraint, or coercion. The *Rules* are violated when an employer disciplines an IBT member for engaging in, or by reason of, campaign activity. *In re Teller,* 91–Elec. App.–92; *In re Braxton,* 91–Elec. App.–108.

2. The Election Officer and the Independent Administrator have the authority to rule upon and enforce the *Rules* even when the prohibited activity may also be an unfair labor practice or a contract violation. *In re McGinnis,* 91–Elec. App.– 43 (Jan. 23, 1991) affirmed *United States v. International Brotherhood of Teamsters et al,* 88 Civ. 4486 (DNE) (S.D.N.Y., slip opinion, April 3, 1991).

B. Deferral to Arbitration Award

3. Pursuant to his authority under the *Consent Order,* the Election Officer cannot defer to an arbitration or other administrative award when the award does not address or resolve the distinct violation of the *Rules* presented by the protest and which the Election Officer is obligated pursuant to the *Consent Order* to determine.

4. The obligation of the Election Officer is analogous to the duty of the National Labor Relations Board ("NLRB") in resolving unfair labor practice charges where the dispute was previously the subject of an arbitration award. But several Courts of Appeals have held that the NLRB may not defer an unfair labor practice charge to an arbitration award unless it is clearly demonstrated that the arbitrator fully considered and clearly decided the statutory issues. See *Taylor v. NLRB,* 786 F.2d 1516, 122 LRRM 2084 (11th Cir. 1986), *citing NLRB v. Wolfe & Munier, Inc.,* 747 F.2d

156, 117 LRRM 2902 (3rd Cir. 1984); *Bakery, Confectionery & Tobacco Workers v. NLRB,* 730 F.2d 812, 115 LRRM 3390 (D.C. Cir 1984).

5. The NLRB, reversing its prior position, held in *Olin Corporation* 228 NLRB 88, 94 LRRM 1483 (1977) that it would no longer require explicit consideration of statutory issues or legal standards by the arbitrator as a prerequisite to the NLRB's deference to the arbitration award. The NLRB held in *Olin* that it will defer to an arbitrator's award if the contractual issue is factually parallel to the unfair labor practice issue and the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The NLRB's position has been severely criticized by the Courts of Appeal. See, e.g., *Taylor v. NLRB, supra.* The United States Court of Appeals for the Second Circuit has specifically reserved judgement on whether the *Olin* standard sufficiently protects employees' rights under the National Labor Relations Act. *Nevins v. NLRB,* 796 F.2d 14, 18 (2nd Cir., 1986). Further, the NLRB will not defer – even under the *Olin* standards – if all the factual issues relative to the unfair labor practice were not presented to or considered by the arbitrator. *Litton Systems* 283 NLRB 144, 125 LRRM 1081 (1987). Since certain of the evidence presented to the Election Officer refer to events occuring after the arbitration hearing, see paragraphs 16 and 17, *infra,* deferral would be inappropriate even under the NLRB's *Olin* standards.

6. Courts have refused to defer to arbitration awards when other types of statutory claims are raised if those claims may be asserted independent of any rights created by a collective bargaining agreement. For example, the Supreme Court in *Alexander v. Gardener-Denver Co.,* 415 U.S. 36 (1974) held that an employee whose grievance was dismissed at arbitration nevertheless could bring an Equal Employment Opportunity Act claim arising from the same underlying facts. The Supreme Court recognized that the arbitrator's competence is in the law of the shop and the collective

bargaining agreement, not the statutes. The Court went on to find that deferral to an arbitral finding is not justified when the arbitrator does not address or resolve a distinct statutory claim. See also *Barrentine v. Arkansas Best Freight Systems,* 450 U.S. 728 (1981) where the Supreme Court refused to defer to an arbitration award relating to overtime claims which were subsequently raised in a lawsuit brought pursuant to the Fair Labor Standards Act.

7. In his decision the Arbitrator relies solely on the terms of the collective bargaining agreement to determine that the discharge of Mr. Henderson was warranted. The Arbitrator does not discuss any of the issues of past practice in his award, nor does the Arbitrator addresses the issue of disparate treatment of Mr. Henderson vis-a-vis other employees of Star Market who received discipline for the same or similar acts. Contentions of discrimination based upon campaign activities were brought forth during the arbitration hearing; however, the Arbitrator does not refer to or rule on those contentions in his decision. Finally, additional evidence was presented to the Election Officer referring to events occurring after the arbitration hearing, e.g. the Employer's June 19, 1991 notice about break times, the decision of the Department of Employment and Training of the Commonwealth of Massachusetts, which matters were not and, because they occurred after the arbitration hearing, could not be brought to the attention of the Arbitrator. Accordingly, the Election Officer cannot defer to the arbitration award upholding the dismissal of Mr. Henderson, there being no evidence that the Arbitrator considered the evidence of the violation of the *Rules* or the disparate treatment of Mr. Henderson.

C. The Merits of the Protest

8. The issue then becomes whether the discharge of Mr. Henderson was motivated in part by his campaign activity in the delegate election, his activity in support of

General President candidate Ron Carey, and/or his campaign activities opposing the other candidates and their supporters. The correct standard under which terminations involving a "mixed motive" must be considered is set forth by the Independent Administrator in *In re Coleman,* 90–Elec. App.–18 (Dec. 14, 1990):

> The National Labor Relations Board has adopted a rule for resolving cases involving a "mixed motive." This rule, adopted by the Board in *Wright Line,* 251 NLRB 10182, 105 LRRM 1169 (1980), *aff'd,* 662 F.2d 899 (1st Cir. 1981), *cert denied,* 455 U.S. 989 (1982), requires:
>
> > that the [complaining party] made a prima facie showing sufficient to support an inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.
>
> 105 LRRM 1175. The Board's *Wright Line* test for resolving mixed motive cases was drawn from the Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1979). The Supreme Court upheld the Board's *Wright Line* analysis in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1963).

9. In the instant case, Mr. Henderson has established a *prima facie* showing sufficient to support an inference that protected conduct was a motivating factor in Star Market's decision to discharge him. The supervisors at Star Market responsible for the discharge of Mr. Henderson were clearly aware of his campaign activities and his support of Ron Carey; they were similarly aware that his political posture in both the delegate and International officer election campaigns were and are antithetical to the positions taken by the officers of Local 25.

The evidence of past practice and of the imposition of much lesser discipline on other employees for the same type of infraction that Mr. Henderson committed further supports the *prima facie* showing that the Employer's decision was motivated by impermissible factors. The evidence demonstrated that many employees who worked with Mr. Henderson during the shift on the evening of his discharge also left work for an early break, just as Mr. Henderson did, but received no discipline, further supporting the *prima facie* case presented by Mr. Henderson.

10. The employer has not met its burden of demonstrating that it would have taken the same action even in the absence of the protected conduct. The employer offered no rationale as to the difference between its discipline of Mr. Henderson and the discipline of other employees for the same type of conduct. Indeed, the only rationale even suggested by the employer for treating Mr. Henderson more severely, that he was a steward, is clearly illegal under the National Labor Relations Act. See *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983); *Eagle Pitcher Industries,* 278 NLRB 102; 121 LRRM 1253 (1986).

11. The employer's action in posting a memorandum concerning the appropriate break times after the arbitration hearing on Mr. Henderson's dismissal grievance demonstrates that it was aware that some of the employees were leaving early for breaks. On the memo, which does nothing more than reiterate the position on break times taken by the employer at the arbitration hearing, Star notes that the breaktime limitations constitute a change in rules for its perishable department employees. Star Market's own actions confirm the validity of evidence which was presented on Mr. Henderson's behalf at the arbitration hearing.

12. In those instances where the company found that an employee had engaged in theft of time in situations analogous to the situation on May 2, 1991

with Mr. Henderson, the discipline imposed was minuscule by comparison to the discipline imposed on Mr. Henderson. This is true even in situations where the employee engaged in other wrongful conduct in addition to leaving work for an early or unauthorized break, such as failing to report back to work after the break, physically and verbally abusing supervisors, and damaging company merchandize. The maximum penalty ever imposed by Star Market in any case was a 20-day suspension. Star Market has failed to rebut the *prima facie* case presented by Mr. Henderson.

13. Accordingly, the Election Officer concluded that the discharge of Mr. Henderson should be reversed and that he be reinstated with full back pay, seniority and all other related benefits. In accordance with discipline previously meted out for this type of offense, the Election Officer found that the company may impose a written warning for Mr. Henderson's offense on May 2, 1991 and place such warning in Mr. Henderson's personnel file. The Election Officer further ordered that Star Market cease and desist from discriminating against Mr. Henderson or any other employee because such employee engages in campaign or other activities protected under the *Rules*.

VI. CONCLUSION

Based on the foregoing, the Election Officer requests that his Decision be affirmed in its entirety.

Respectfully submitted,

/s/
MICHAEL H. HOLLAND
Election Officer

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of September, 1991, I caused the foregoing Election Officer Summary to be served via UPS overnight mail for Saturday delivery and facsimile where indicated:

Neal Henderson
36 Waverly Street
Brockton, MA 02401-3408

Jack Kelliher
c/o Star Market
625 University Ave.
Norwood, MA 02062

William J. McCarthy
President
Teamsters Local 25
544 Main St.
Boston, MA 02129

Karen A. Keys, Esquire
Counsel, Teamsters for a Democratic Union
2000 P Street, NW
Suite 700
Washington, DC 20036

Dick MacDonald
Vice President, Distribution
Star Market Company
625 Mount Auburn Street
Cambridge, Massachusetts 02136

Frank Raucci, Esquire
709 East South Temple
Salt Lake City, Utah 84107
FAX: (801) 537-7808

/s/

OFFICE OF THE ELECTION OFFICER
c/o INTERNATIONAL BROTHERHOOD
OF TEAMSTERS
25 Louisiana Avenue, NW
Washington, DC 20001

Michael H. Holland
Election Officer

(202) 624-8778
1-800-828-6496
Fax (202) 624-8792

September 9, 1991

VIA UPS OVERNIGHT

Neal Henderson
36 Waverly Street
Brockton, MA 02401-3408

William J. McCarthy
President
Teamsters Local 25
544 Main St.
Boston, MA 02129

Jack Kelliher
c/o Star Market
625 University Ave.
Norwood, MA 02062

Re: Election Office Case No. P-760-LU25-ENG

Gentlemen:

A protest was filed pursuant to the *Rules for the IBT International Union Delegate and Officer Election,* revised August 1, 1990 (*"Rules"*) by Neal Henderson, a member of Local Union 25 and a certified delegate to the 1991 IBT International Union Convention from Local Union 25. The protest concerns the propriety of Mr. Henderson's discharge by his employer, Star Markets. Mr. Henderson contends that he was discharged in retaliation for his participation in the delegate and International officer election processes as a supporter of General President candidate Ron Carey.

Pursuant to his authority under the *Rules,* the Election Officer by letter dated May 14, 1991 determined to defer his review and determination of this

protest pending the results of the grievance filed concerning this discharge pursuant to the grievance/arbitration provisions of the collective bargaining in effect between Star Market and the IBT. Those processes have now concluded. Mr. Henderson's discharge was upheld by an independent arbitrator and thus the matter is now ripe for consideration and determination by the Election Officer.

In addition to questioning the propriety of his discharge by Star Market, Mr. Henderson at the time of filing of this protest also questioned whether the IBT representatives on the Joint Area Grievance Panel, or some of them, would discriminate against him on the basis of his campaign activities. Mr. Henderson noted that one IBT member on the Joint Area Grievance Panel was his opponent in the Local 25 delegate election. As noted above the discharge grievance was referred by the Joint Area Grievance Panel to an independent arbitrator; none of the IBT members of the IBT grievance panel participated in rendering the decision on Mr. Henderson's grievance. Further, the Election Officer's investigation determined that the Business Agent representing Mr. Henderson in the grievance process, William Carnes, fairly and properly represented him. No basis exists for finding that the IBT, Local 25 or any member or officer of the IBT or of Local 25 violated the *Rules* in connection with Mr. Henderson's discharge.

Neal Henderson has been employed by Star Market since approximately 1977. He has been a Steward for approximately five years. Prior to his discharge, the last discipline meted out to him occurred in 1983; he received three warning notices in 1983. The pertinent collective bargaining agreement provides that written warning notices are not to remain in effect for a period of more than nine months.

Mr. Henderson was a successful candidate for delegate from Local Union 25. He sought such position on a slate committed to the candidacy of Ron Carey for General President. Subsequent to the election he has

continued to engage in campaign activities, activities supportive of Mr. Carey's candidacy and activities which negatively impact upon other candidates and their supporters. He has engaged in such campaign activities openly and at his place of employment. Star Market and its supervisory personnel were aware of Mr. Henderson's candidacy and his continued support for nominated General President candidate Ron Carey. From time to time supervisory employees have made remarks to Mr. Henderson which could be considered disparaging of his candidacy for delegate or disparaging of his other campaign activities. For instance when Mr. Henderson, prior to his election as delegate, applied to take his vacation during the week of the 1991 IBT International Union Convention, he was asked by his supervisor, "Aren't you being a little overconfident?" Certain supervisory employees also made remarks to Mr. Henderson suggesting that Mr. Carey could not be elected.

On Thursday evening May 2, 1991 Mr. Henderson along with ten other employees of Star Market accepted a three hour overtime assignment, the overtime hours to occur immediately prior to their regular shift of 10:00 p.m. to 6:30 a.m. The collective bargaining agreement between Star Market and the IBT provides in Article 14, §3(e) that there will be two fifteen minute break periods in each shift, fifteen minutes between the second and third hours and fifteen minutes between the sixth and seventh hours. Additionally that section of the contract provides an additional twenty minute rest period after eight hours of work, ten hours of work, and each successive two hours thereafter. Appendix D of the agreement, at paragraph 18, provides that employees in perishables, where Mr. Henderson and his fellow employees were working on May 2, 1991, may leave work when the shift is finished but that there shall be no extended non-contractual breaks or free time otherwise except by mutual agreement with Star Market. The collective bargaining agreement does not require Star Market employees to punch in or out on their timecards

except at the beginning and end of the shift and for meal periods. Collective Bargaining Agreement at Article 14, §4.

On May 2, 1991, Mr. Henderson left his work station prior to the completion of his overtime shift and at a time when other employees working that overtime shift had not completed their work; the shift had not finished in the perishable operation. Mr. Henderson left the plant entirely. Employees of Star Market are permitted to leave the plant during their breaks.

Mr. Henderson claims that he left to obtain medicine and/or to call the Business Agent from Local 25 who had responsibilities with respect to the employees working at Star Market. Doug Darcy, a Local 25 member employed at Star Market working with Mr. Henderson on the overtime shift on May 2, 1991 in perishables left his work station shortly before Mr. Henderson and met Mr. Henderson outside the plant at Mr. Henderson's car.[1]

Mr. Henderson claims that Star Market employees working in perishables have historically and traditionally been permitted to leave their workstation and take a break when the particular employee's work assignment is finished. Thus, Mr. Henderson claims that employees may take their break prior to the time for taking breaks as established in the collective bargaining agreement, may extend their breaks longer than the time set forth in the collective bargaining agreement and commence their breaks prior to the time that all other perishable employees working that shift have completed their

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1. Although Mr. Darcy testified at the arbitration hearing it is not clear whether he told the arbitrator that he accompanied Mr. Henderson outside the plant. Star maintains surveillance photos of all persons entering or leaving the Star Market facility which also were not introduced at the arbitration hearing. Star Market does not claim that the surveillance photos fail to show Mr. Darcy leaving the plant shortly before Mr. Henderson left.

workload. Numerous other members of Local 25 employed by Star Market support Mr. Henderson's contention.

Subsequent to Mr. Henderson's discharge and the arbitration hearing, on June 19, 1991, Star Market posted a notice for all its employees working in perishables with respect to shift break times noting "that certain shifts are somehow unsure of the times they are to go to break." The notice also noted that the rules would not go into full effect until Sunday, June 30, 1991 since "there are a couple of changes." One of the changes referenced was that portion of Appendix D referred to above and relied upon by Star Market in discharging Mr. Henderson i.e. the provisions of paragraph 18 prohibiting non-contractual breaks, extra time for breaks or the right of the employees to take breaks early except at the end of the shift when the entire shift has completed its work. The notice posted by the company thus further supports Mr. Henderson's contention that the historical practices for employees in the perishable area permitted such employees to leave their workstations and go on breaks, when such employees work assignment for the shift was completed.

The Department of Employment and Training of the Commonwealth of Massachusetts in its decision determining Mr. Henderson's eligibility for unemployment compensation benefits found that Mr. Henderson's discharge was "not attributable solely to deliberate misconduct and wilful disregard of the employing units interest." The Department found that prior to Mr. Henderson's discharge "it was not unusual for employees to take their workbreaks when they completed their overtime assignments."

With respect to the overtime shift on May 2, 1991, Mr. Henderson's regular break should have commenced at 9:25 p.m. As pointed out above, it is undisputed that he left his workstation prior to that time, at or about 9:00 p.m. Star Market does not dispute that Mr. Henderson had finished the tasks theretofore assigned him when he

left. However, starting at or shortly before 9:00 p.m. John Gill, the Star Market supervisor in charge of the overtime shift began looking for Mr. Henderson in order to give Mr. Henderson another assignment. Such other assignment was to remove a small stack of pallets left by the day shift which had tipped over and was partially blocking an aisle.

Mr. Gill was first informed of the pallet problem at or about 7:30 p.m. and then reminded that it had not yet been taken care of at or about 8:45 p.m. by the same employee who had first brought the matter to his attention. It should be noted that this employee reminded Mr. Gill of the pallet problem at a time when the employee himself was leaving his workstation to go on break although, as with Mr. Henderson, not all employees on the shift had finished their work.

On May 2, 1991 other employees besides Mr. Henderson and the employee who reminded Mr. Gill of the pallet problem, also took their breaks early, that is left their workstation prior to 9:25 p.m. and prior to the time that all employees on the overtime shift had completed their work. Other than Mr. Henderson, and perhaps Mr. Darcy, all such employees apparently took their break in the breakroom; they did not leave the plant premises. Star Market permits, however, employees on breaks to leave the plant premises if they so desire. No employee other than Mr. Henderson was disciplined.

The evidence presented to the Election Officer also reveals that other Star Market employees who have been given discipline for leaving their workstations and/or for taking "early" breaks have been disciplined far less severely than Mr. Henderson. In July, 1990 four employees left their workstations approximately fifteen minutes prior to the shift being released by supervisor. All four employees were initially given one day suspension, later reduced to a verbal warning; the four employees received one days back pay each.

In August, 1990 an employee was found in the upstairs breakroom playing pool at a time when he was

supposed to be in the warehouse working. The employee disobeyed the direct instructions from his supervisor to return to work and became verbally abusive to the supervisor. The employee also threw a cue ball down on the pool table which ball hit another ball which other ball ended up striking the supervisor in the arm. The employee received a twenty-day suspension.

In support of its decision that Mr. Henderson should be discharged, Star Market relies upon the specific terms of the collective bargaining agreement and in particular paragraph 18, Appendix D of that agreement. It further takes the position that Mr. Henderson because he is a long-time steward and indeed helped negotiate such collective bargaining agreement should know the rules and the terms of the collective bargaining agreement. As the company stated in its summation to the arbitrator, "[A]s a Steward he is supposed to set an example for his fellow employees. I would think if anyone would show responsibility and leadership, it would be the Steward. If anyone deserves the trust and respect of Management, it should be the Steward. If anyone won't break the rules or screw the Company or screw his Supervisor, it should be the Steward we can trust to be responsible.[2]

The arbitrator in his decision relied solely upon the terms of the collective bargaining agreement: "it is therefore my finding and award that the language of the agreement and appendix thereto is not ambiguous; that it means exactly what is [sic] says, and nothing has occurred legally warranting the Arbitrator to modify the terms and intent of the contract." The arbitrator does not discuss any of the issues of past practice in issuing his award. Neither does the arbitrator consider whether

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2. It is a violation of federal substantive law if the basis for imposing discipline or more severe discipline is grounded upon the fact that the employee so disciplined is a Union steward or officer. *Metropolitan Edison Company v. NLRB* 460 U.S. 693 (1983); *Eagle Pitcher Industries,* 278 NLRB 102 121 LRM 1253 (1986).

more severe discipline was being imposed because Mr. Henderson was a steward. Further, while contentions of discrimination based upon campaign activities were brought forth during the arbitration hearing, the arbitrator does not refer to those contentions or their factual support in his decision. The National Labor Relations Board will defer to an arbitrator's award as opposed to issuing an unfair labor practice complaint if (1) the contractual issue is factually parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. The National Labor Relations Board no longer requires explicit consideration of statutory issues or legal standards by the arbitrator before it will defer to an arbitrable award. *Olin Corp.* 228 NLRB 808 94 LRM 1483 (1977)[3]

Even were the Election Officer to apply a similar standard, it is unclear in this case whether the arbitrator considered the factual issues that are to be considered by the Election Officer in determining this protest. Further, certain of the evidence presented to the Election Officer referred to events occurring after the issuance of the arbitrator's award, e.g. the employer's June 19, 1991 notice about breaktime and the decision of the Department of Employment and Training. Neither of these matters were brought to the attention of the arbitrator. Thus even under the National Labor Relation Board's deferral standards, deferral would not be required here. *Litton Systems* 283 NLRB 144 125 LRM 1081 (1987). For these reasons the Election Officer refuses to defer to the arbitration award here.

The issue before the Election Officer is whether Mr. Henderson's discharge was based upon animus against him by Star Market due to his campaign and other

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3. The United States Court of Appeals for the Second Circuit has specifically reserved judgment on whether the Olin standard sufficiently protects employees rights under the National Labor Relations Act. *Nevins v. NLRB* 796 F.2d 14, 18 (CA2, 1986).

activities, activities protected under the *Rules*. Star Market clearly had knowledge of Mr. Henderson's campaign activities. While independent evidence of animus towards him based upon such campaign activities is weak, the Election Officer concludes that sufficient evidence has been presented to demonstrate a *prima facia* case.

The company's rebuttal of the *prima facia* case is not supported by the evidence. The evidence is overwhelming that Mr. Henderson did nothing more on May 2, 1991 than other Star Market employees have traditionally and historically done. The company's own notice of June 19, 1991 buttresses that conclusion. Under the law, Mr. Henderson cannot be held to a higher standard than other employees merely because he is a steward. Even in those cases where the company found that an employee had engaged in a theft of time in a situation analogous to the situation on May 2, 1991 with Mr. Henderson, the discipline imposed was minuscule by comparison to the discipline imposed on Mr. Henderson. Even in a situation where the employee not only left work but refused a direct order to return to work and was verbally and physically abusive thereafter, Star Market only imposed a twenty day suspension. Star Market has failed to rebut the *prima facia* case presented by Mr. Henderson.

The Election Officer has no alternative but to reverse the discharge and order Mr. Henderson reinstated with full back pay, full seniority and all other related benefit. In accordance with discipline previously meted out for similar offenses, the Election Officer finds that the company may impose a written warning for Mr. Henderson's offense on May 2, 1991 and place such warning in Mr. Henderson's file.

In accordance with the foregoing the Election Officer orders the following:

1) Star Market shall immediately reinstate Neal Henderson to his former position with the company

with full seniority, full back pay and the restoration of any and all other benefits. Star Market may discipline Mr. Henderson for the events of May 2, 1991 with a written warning.

2) Star Market shall cease and desist from discriminating against Mr. Henderson or any other employee because such employee engages in campaign or other activities protected under the *Rules*.

If any interested party is not satisfied with this determination, they may request a hearing before the Independent Administrator within twenty-four (24) hours of their receipt of this letter. The parties are reminded that, absent extraordinary circumstances, no party may rely upon evidence that was not presented to the Office of the Election Officer in any such appeal. Requests for a hearing shall be made in writing, and shall be served on Independent Administrator Frederick B. Lacey at LeBoeuf, Lamb, Leiby & MacRae, One Gateway Center, Newark, New Jersey 07102-5311, Facsimile (201) 622-6693. Copies of the request for hearing must be served on the parties listed above, as well as upon the Election Officer, IBT, 25 Louisiana Avenue, N.W., Washington, D.C. 20001, Facsimile (202) 624-8792. A copy of the protest must accompany the request for a hearing.

Very truly yours,

/s/

Michael H. Holland

MHH/cdk

cc: Frederick B. Lacey, Independent Administrator
Elizabeth A. Rodgers, Regional Coordinator
(For Information Only)

IN RE: NEAL HENDERSON and STAR MARKET and IBT LOCAL UNION NO. 25	91 – Elec. Appl. – 187 (SA) DECISION OF THE INDEPENDENT ADMINISTRATOR

This matter arises out of an appeal from a decision of the Election Officer in Case No. P-760-LU25-ENG. A hearing was held before me by way of telephone conference at which the following persons were heard: the complainant, Neal Henderson; Karen Keys, on behalf of Mr. Henderson; Francis Raucci, on behalf of the employer Star Market; and John Sullivan, on behalf of the Election Officer. Elizabeth Rogers, the Regional Coordinator, audited the hearing.

Mr. Henderson alleges that he was discharged by his employer, Star Market, in retaliation for his participation in the delegate and International officer election process protected by the *Rules For The IBT International Union Delegate And Officer Election* (the "Election Rules"). The Election Officer found Mr. Henderson's allegations to be meritorious and concluded that Mr. Henderson's discharge should be reversed and that he should be reinstated with full back pay, seniority and all other related benefits. The Election Officer also found that Star Market may impose a written warning for Mr. Henderson's offense and place such warning in Mr. Henderson's personnel file. Lastly, the Election Officer ordered Star Market to cease and desist from

discriminating against employees because of campaign activity or other activity protected by the Election Rules.

The ruling of the Election Officer is affirmed in all respects.

Mr. Henderson, a member of IBT Local 25, has been employed by Star Market since 1977. He has been a Union steward for Local 25 at Star Market since approximately 1986. At the time of his discharge Mr. Henderson was employed by Star Market as a warehouseman in the perishable department.

Mr. Henderson also served as a delegate to the 1991 IBT Convention on behalf of Local 25. Mr. Henderson was elected as a delegate as part of a slate of candidates committed to the candidacy of Ron Carey for General President. Mr. Henderson and his slate were opposed by an incumbent officer slate headed by William J. McCarthy, the General President of the International Brotherhood of Teamsters and the President of Local 25. Mr. McCarthy and his slate supported the candidacy of R.V. Durham for IBT General President.

Subsequent to his election as a delegate, Mr. Henderson has continued to openly engage in campaign activity supporting Carey's candidacy. Mr. Henderson's supervisors are aware of his political activities and they are also aware that Local 25's officers have opposing political views. The Election Officer's investigation found that from time to time Star Market supervisory employees made remarks to Mr. Henderson which could be considered disparaging of his candidacy for delegate and/or disparaging of his other campaign activities.

On May 2, 1991, Mr. Henderson and ten other employees worked a "pre-shift overtime." In other words Mr. Henderson worked additional hours before his regular shift was to begin at 10:00 p.m. The pre-shift overtime began at 7:00 p.m.

Mr. Henderson had completed his pre-shift work at approximately 9:00 p.m. and after checking with his fellow employees whether his services would be needed

further, he left the Star Market plant. Mr. Henderson stated that he left the plant to purchase some cold medication, purchase lunch, and contact a Local 25 business agent concerning earlier meetings held with the company.

Mr. Henderson returned to the plant at approximately 10:00 p.m. and entered the lunch room where a shift meeting was in progress. After the shift meeting was completed the Star Market supervisor on duty requested to speak with Mr. Henderson. At that time Mr. Henderson was told that he was suspended pending investigation into the circumstances of his leaving the plant. By letter dated May 13, 1991, Jack Kelleher, Manager of the perishable warehouse for Star Market, advised Mr. Henderson that his employment was terminated for dishonesty – stealing company time.

Pursuant to the grievance procedure set forth in the collective bargaining agreement between Local 25 and Star Market, Mr. Henderson's discharge was the subject of an arbitration which was held on June 12, 1991. On July 17, 1991, the arbitrator issued an award finding that Mr. Henderson was justifiably discharged and denied his grievance. In his decision the arbitrator relied solely upon the terms of the collective bargaining agreement.

JURISDICTION

Star Market claims that the Election Officer and the Independent Administrator have no jurisdiction over it. It is now settled that the Election Officer and the Independent Administrator have jurisdiction over employers to enforce the provisions of the Election Rules. *See In Re: McGinnis,* 91 - Elec. App. - 43 (January 23, 1991), *aff'd, United States v. IBT,* 88 Civ. 4486, slip op. (S.D.N.Y. April 3, 1991)

DUE PROCESS

Star Market suggests that its "rights to due process" have been violated by, among other things:

1. Lack of notice of the procedure to be utilized in review of the protest;

2 Lack of notice of any legal authority to support the Election Officer's rule;

3. Failure to provide it with a meaningful opportunity to be heard;

4. Failure to provide it with documents and information necessary to participate in a meaningful way in the process; and

5. Failure to provide it with adequate time to prepare.

[Star Market's September 17, 1991, Letter Memorandum at p. 4.]

Without addressing the extent to which the conduct of the Election Officer and the Independent Administrator constitute "state action" under these circumstances, *see, United States v. IBT,* 91-6052, slip op. (2d Cir. August 6, 1991), Star Market's due process concerns will be addressed.

On May 14, 1991, the Election Officer wrote to the parties acknowledging receipt of Mr. Henderson's protest under "Article XI, §1 of the" Election Rules. In that letter, the Election Officer, citing to *In Re: McGinnis,* also stated that he has "jurisdiction and authority to determine the instant protest on its merits." It was further stated that, "[b]ecause the Rules require protests be investigated in an expeditious manner, all interested parties . . . should immediately contact the Washington Office of the Election Officer with all information relevant to the allegations contained in the protest."

Thus, it is clear that as early as May 1991, Star Market was put on notice that the Election Officer would process the protest pursuant to the Election Rules. The Election Officer's "legal authority" to do so

was also set forth.[1] Star Market was also invited to contact the Election Officer "with all information relevant to the allegations contained in the protest." This clearly constitutes an "opportunity to be heard." If Star Market believed it needed additional "documents and information" to prepare, it should have directed such requests to the Election Officer. Concerning Star Market's claims regarding "adequate time to prepare" I again note that it was advised that the Election Officer was considering the protest in mid-May. The Election Officer's decision did not issue until some four months later in mid-September. This is certainly "adequate time to prepare." Moreover, to the extent Star Market challenges the schedule set forth in the Election Rules for resolving appeals (Article XI), it is only noted that the schedule has already been approved by the United States District Court for the Southern District of New York and affirmed by the United States Court of Appeals for the Second Circuit. *United States v. IBT,* 742 F.Supp. 94 (S.D.N.Y. 1990), *aff'd,* 931 F.2d 177 (2d Cir. 1991).

DEFERENCE TO THE ARBITRATOR'S DECISION

Star Market argues that the Election Officer must adhere to the arbitrator's decision issued in the collective bargaining grievance proceeding. In making this argument Star Market ignores the fact that the "Election Officer has jurisdiction independent of the arbitrator." *In Re: Shrader,* 91 - Elec. App. - 124 (SA) (April 12, 1991) at p. 4. As explained in *Shrader:*

> The Election Officer is not overturning the decision of the Grievance Committee, but rather addressing a violation of the Rules independent of

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1. I note here that the Election Officer is under no obligation to set forth his "legal authority." That he did so is commendable.

> the Grievance Committee's actions. That the Election Officer's decision may have the effect of modifying the decision of the Grievance Committee is of no moment.

See also, Lingle v. Norge Division, Magic Chef, 486 U.S. 399, 411 (1988) ("[T]here is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements."); *Barrentine v. Arkansas-Best Freight System,* 450 U.S. 728, 744 (1981) (An arbitrator "has no general authority to invoke public laws that conflict with the [collective bargaining agreement] between the parties."); *Alexander v. Gardner-Denver Company,* 415 U.S. 36, 53 (1974) ("The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties.")

Star Market also makes much of the fact that the Election Officer postponed issuing his decision in this matter pending the arbitrator's decision. Star Market suggests that this can only be interpreted as the Election Officer's recognition of his obligation to defer to the arbitrator's decision.

As the Election Officer explained at the hearing, he postponed the issuance of his decision in the event the arbitrator sustained Mr. Henderson's grievance and thus, rendered the entire protest moot. At no time did the Election Officer concede or acknowledge that he was bound by any decision of the arbitrator.

THE MERITS

In the past, when the Independent Administrator has reviewed allegations that a discharge or discipline was motivated, at least in part, by an employee's protected campaign activity he has applied a mixed motive analysis. *See In Re: Coleman,* 91 – Elec. App – 18 (SA) (December 14, 1990). As explained in *Coleman:*

The National Labor Relations Board has adopted a rule for resolving cases involving a "mixed motive." This rule, adopted by the Board in *Wright Line,* 251 NLRB 10182, 105 LRRM 1169 (1980), *aff'd,* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), requires:

> that the [complaining party] make a prima facie showing sufficient to support an inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

105 LRRM 1175. The Board's *Wright Line* test for resolving mixed motive cases was drawn from the Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274 (1979). The Supreme Court upheld the Board's *Wright Line* analysis in *NLRB v. Transportation Management Corp.,* 462 U.S 393 (1983).

Following the *Wright Line* standard. Mr. Henderson has made a *prima facie* showing that his campaign activity and his support of Ron Carey, in the face of the Union leadership's support of the opposition candidate Durham, was a "motivating factor" in his discharge.[2] Thus, the burden shifts to Star Market to demonstrate that it would not have discharged Mr. Henderson but for his campaign activity. The Election Officer's investigation, however, did not reveal a single instance where

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2. As noted. Mr. Henderson's support for Carey was well known. In addition, supervisory employees had negatively commented to Mr. Henderson regarding his political activities. I can not be ignored that employers may choose to defer to the political choices of the incumbent leadership. As observed in *United States v. IBT,* 88 Civ. 4486, slip op. (S.D.N.Y. April 3, 1991), at p. 6:

> Employers may have developed comfortable relationships with incumbent IBT officers, and may not be anxious for new, and perhaps more assertive union representatives.

Star Market had discharged an employee for "stealing time." The Election Officer's investigation revealed a wide range in penalties for similar violations. The most lenient penalty was a verbal warning and the most severe sanction was a 20-day suspension. The 20-day suspension arose out of a situation where an employee was shooting pool in a break room at a time when he was supposed to be working, became verbally abusive to his supervisor, and threw a pool cue all down on the pool table, which ball hit another ball and ended up striking the supervisor in the arm.

The evidence also demonstrated that many of the other employees who had worked the pre-shift overtime on the evening in question also left the pre-shift early, just as Mr. Henderson did, but received no discipline.

Star Market suggests that it has treated Mr. Henderson more severely because he is a Union steward. Such a rationale is simply not recognized in the law. *See, e.g., Metropolitan Edison Company v. NLRB,* 460 U.S. 693-702 (1953) ("The Board has found that disciplining Union officials more severely than other employees for participating in") prohibited conduct is unlawful and discriminatory.

Furthermore, subsequent to Mr. Henderson's arbitration, Star Market posted a memo dated June 19, 1991, with respect to break times in the perishable department. That memo provided in part "[t]hat certain shifts are somehow unsure of the times they are going to go to break." The memo also noted that "there are a couple of changes" in the break shift policy. This further suggests that Star Market was aware that some of its employees were leaving early for breaks. It was only Mr. Henderson, however, that lost his job for leaving his shift early.

Given the background here, there can be only one explanation for Star Market's actions. It was retaliating against Mr. Henderson because of his political activity and his support of Carey. The Election Rules simply do not tolerate such action. *See* Election Rules Article VIII, Section 10 ("Freedom to Exercise Political Rights.").

See, also, United States v. IBT, 742 F. Supp. 94, 97 (S.D.N.Y. 1990), *aff'd,* 931 F.2d 177 (2d Cir. 1991) ("This Court will only approve election rules that will guarantee honest, fair, and free elections completely secure from harassment, intimidation, coercion, hooliganism, threats, or any variant of these no matter under what guise.")

Accordingly, the decision of the Election Officer is affirmed in all respects.

/s/

Frederick S. Lacey
Independent Administrator
By: Stuart Alderoty, Designee

Date: September 18, 1991

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	*ORDER TO SHOW CAUSE*
-*v*-	:	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,	:	88 Civ. 4486 (DNE)
Defendants.	:	

The Court having read the attached Declaration of Edward T. Ferguson, III, executed on October 24, 1991, and reviewed the exhibits attached thereto, and being fully familiar with the prior proceedings in this action; the Election Officer appointed by the Court pursuant to the March 14, 1989 Order (the "Consent Decree") in this action having determined that Star Market, Inc. ("Star Market") has violated the Rules for the IBT International Union Delegate and Officer Election (the "Election Rules") by discharging Neal J. Henderson, a member of defendant International Brotherhood of Teamsters (the "IBT"), in retaliation for his having engaged in IBT International Union election campaign activity protected by the Election Rules, and having ordered Star Market to reinstate Henderson to his position with full seniority, back pay, and other benefits; the Independent Administrator appointed by the Court pursuant to the Consent Decree having affirmed the Election Officer's order; Star Market having failed to appeal the Independent Administrator's decision to this Court

pursuant to the Election Rules, and having refused to comply with the Election Officer's order, it is hereby

ORDERED that Star Market, by its attorney in this matter, Robert J. Bray, Jr., Esq., and a senior management employee of its choosing with full authority to bind the company in this matter, appear before this Court, in Courtroom 1105 of the United States Courthouse, Foley Square, New York, New York, on October 28, 1991, at 9:00 a.m./p.m., to show cause why the Court should not enter an order (i) directing Star Market to comply fully, within twenty-four hours, with the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG, which decision was affirmed by the September 18, 1991 decision of the Independent Administrator in *In re Neal Henderson and Star Market and IBT Local Union No. 25,* 91 Elec. App. 187 (SA), by reinstating Neal J. Henderson with full seniority, back pay, and other benefits; (ii) in the event of Star Market's failure to comply as directed, adjudging Star Market in civil contempt and imposing coercive sanctions as the Court deems appropriate, including, without limitation, substantial daily fines (of at least $10,000 per day), until such time as Star Market complies as directed; and (iii) awarding plaintiff United States of America (the "Government"), the Election Officer, and the Independent Administrator such other and further relief as the Court deems just and proper, including their attorney fees in connection with this matter; and it is further

ORDERED that service by the Government of a copy of this Order to Show Cause and of the papers submitted by the Government in support of its application for same on Star Market's attorney, Robert J. Bray, Jr., Esq. of Elliott, Bray & Riley, 2700 Centre Square West, Philadelphia, Pennsylvania 19102, by 12:00 noon

on October 25, 1991, shall constitute good and sufficient service hereof.

Dated: New York, New York
October 24, 1991

/s/

UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	DECLARATION OF *EDWARD T. FERGUSON, III*
-v.-	:	88 Civ. 4486 (DNE)
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *et al.*,	:	
Defendants.	:	

EDWARD T. FERGUSON, III, pursuant to 28 U.S.C. § 1746, declares the following under penalty of perjury:

1. I am an Assistant United States Attorney in the Office of Otto G. Obermaier, United States Attorney for the Southern District of New York, attorney for plaintiff United States of America (the "Government") in this action. In that capacity I have charge of this action for the Government and am fully familiar with the prior proceedings herein.

2. I make this declaration in support of the Government's motion for an order (i) directing Star Market, Inc. ("Star Market") to comply fully, within twenty-four hours, with the September 9, 1991 decision of the Election Officer in Election Office Case No. P-760-LU25-ENG, which decision was affirmed by the September 18, 1991 decision of the Independent Administrator in *In re Neal-Henderson and Star Market and IBT Local Union No. 25,* 91 Elec. App. 187 (SA); (ii) in the event of Star Market's failure to comply as directed, adjudging Star Market in civil contempt and imposing appropriate coercive sanctions, including substantial daily fines (of at least $10,000 per day), until such time

as Star Market complies as directed; and (iii) awarding the Government, the Election Officer, and the Independent Administrator such other and further relief as the Court deems just and proper, including their attorney fees in connection with this motion.

I. Pertinent Background

3. As the Court is aware, the Election Officer, appointed by the Court pursuant to the March 14, 1989 Order (the "Consent Decree") agreed to by the Government and defendant International Brotherhood of Teamsters (the "IBT") in settlement of the bulk of this civil racketeering action, is empowered to supervise the implementation of the Decree's electoral provisions, culminating in the first-ever direct rank-and-file election of IBT International Union officers. *See* Consent Decree (copy attached hereto as Exhibit A), ¶ 12(D); *see also United States* v. *IBT,* 723 F. Supp. 203, 206-07 (S.D.N.Y.), *appeal dismissed,* No. 89-6252 (2d Cir. Dec. 13, 1989), *cert. denied,* 110 S. Ct. 2618 (1990).

4. Pursuant to his supervisory authority, in 1990 the Election Officer issued Rules for the IBT International Union Delegate and Officer Election (the "Election Rules"), which were approved as modified by this Court and the United States Court of Appeals for the Second Circuit. *See United States* v. *IBT,* 742 F. Supp. 94 (S.D.N.Y. 1990), *aff'd*, 931 F. 2d 177 (2d Cir. 1991). The Election Rules (pertinent excerpts attached hereto as Exhibit B) protect, *inter alia,* the rights of IBT members to participate in union election campaign activities, *see* Art. VIII, § 10(a), and enable the Election Officer to respond to violations of the Election Rules (or any other conduct preventing a fair, honest, and open election) with a wide range of remedial measures. *See* Art. XI, § 2.

II. Star Market's Retaliatory Discharge of IBT Member Neal Henderson[1]

5. Neal J. Henderson is a member of IBT Local 25 in Boston, Massachusetts. The principal officer of Local 25 is IBT General President William J. McCarthy. At the time of the events giving rise to his protest, Henderson had been employed by Star Market since 1977 and worked as a warehouseman in the perishables department of one of its Boston-area facilities. Star Market has a collective bargaining agreement with Local 25. Henderson has been a Union steward at Star Market since 1986.

6. Last spring Henderson ran for delegate to the IBT International Union convention on a slate supporting the candidacy of Ron Carey for IBT General President. Henderson and his slate were opposed by a slate associated with McCarthy and supporting the candidacy of R. V. Durham for General President. On a number of occasions, Star Market supervisors made disparaging remarks to Henderson about his candidacy for delegate and his other pro-Carey campaign activities.

7. Henderson won election as a Local 25 delegate to the International Union convention. Thereafter, he continued to engage in pro-Carey campaigning and to criticize the other candidates for IBT General President and the Local 25 officers, including McCarthy, who supported them. Henderson engaged in these campaign activities openly at his place of employment, and his Star Market supervisors knew of those activities and of his political opposition to Local 25's officers.

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1. The following account is based on the Election Officer's investigation into a protest filed by IBT member Neal J. Henderson (copy attached hereto as Exhibit C). *See* Election Rules, Art. XI, § 1 (protest procedures). The results of the Election Officer's investigation are set forth in his September 9, 1991 decision on the protest (copy attached hereto as Exhibit D), as well as in the Election Officer Summary (copy attached hereto as Exhibit E) submitted to the Independent Administrator in connection with Star Market's appeal from that decision.

8. On May 2, 1991, Henderson accepted a pre-shift overtime assignment to begin at 7:00 p.m. and end at 9:25 p.m., before his regular shift beginning at 10:00 p..m. Star Market employees working pre-shift overtime are entitled to a rest period or break between the end of the overtime period and the start of the regular shift. In addition, it was the practice of employees working pre-shift overtime in the perishables department to leave early for their break when their work was completed.

9. On May 2, 1991, Henderson completed his work assignment on pre-shift overtime at about 9:00 p.m. and, after checking with his fellow employees whether his services were needed, left the Star Market facility to buy some cold medicine, get something to eat, and conduct some union business. Upon his return for his regular shift at 10:00 p.m., Star Market supervisory personnel suspended Henderson. On May, 13, 1991, Star Market management terminated Henderson for "stealing company time," *i.e.,* leaving the facility before the end of the pre-shift overtime period.

10. Henderson grieved his discharge pursuant to the collective bargaining agreement and also filed a protest under the Election Rules, asserting that his discharge was politically motivated. *See* Exhibit C. The Election Officer deferred action on Henderson's protest pending an arbitrator's decision on the grievance. *See* Exhibit D at 1. On July 17, 1991, the arbitrator denied the grievance on the ground that Star Market's termination decision was consistent with the language of the collective bargaining agreement. *See id.* at 5. The arbitrator made no findings on the issue of retaliation, which was the essence of Henderson's protest under the Election Rules. *See id.*

11. The Election Officer's investigation of the protest revealed that on May 2, 1991, other Star Market employees besides Henderson working pre-shift overtime in the perishables department left their work stations before the overtime period ended. *See* Exhibit D at 4. Only Henderson, however, was disciplined for doing

so. *Id.* The investigation further revealed that the discipline imposed on Henderson was far more severe than that imposed on others for similar infractions in the past. *See id.* at 4-5.

12. On September 9, 1991, the Election Officer issued a decision finding that Star Market had retaliated against Henderson for engaging in union election campaign activity protected by the Election Rules. *See* Exhibit D at 6. Accordingly, the Election Officer directed Star Market to reinstate Henderson to his former position with full seniority, full back pay, and full restoration of all other benefits, and to cease and desist from discriminating against Henderson or any other employee on account of campaign or other activities protected by the Election Rules. *Id.* at 7.

13. Exercising its right under the Election Rules, Star Market appealed the Election Officer's decision to the Independent Administrator. *See* Election Rules, Art. XI, § 1 (a) (5). On September 18, 1991, the Administrator issued a decision (copy attached hereto as Exhibit F) affirming the Election Officer's decision in all respects:

> Given the background here, there can be only one explanation for Star Market's actions. It was retaliating against Mr. Henderson because of his political activity and his support of Carey. The Election Rules simply do not tolerate such action.

Exhibit F at 10.

III. Star Market's Refusal to Comply with the Election Officer's Order

14. Star Market has neither complied with the Election Officer's directive to reinstate Henderson nor appealed the Independent Administrator's decision to this Court. *See* Election Rules, Art. XI, § 1(a)(8) (Administrator's "decision 'must be followed unless it is stayed or overturned by the Court"). Indeed, counsel for Star Market expressly stated that his client would not

comply, whereupon the Election Officer requested the Government to initiate appropriate contempt proceedings against Star Market. *See* September 26, 1991 letter from Election Officer to Government (copy attached hereto as Exhibit G); *see also* October 2, 1991 letter from Independent Administrator to Government (copy attached hereto as Exhibit H) (joining in Election Officer's request).

15. By letter dated October 3, 1991 (copy attached hereto as Exhibit I), the Government informed Star Market's counsel that unless the company complied with the Election Officer's directives by October 7, the Government would initiate civil contempt proceedings before this Court. By letter dated October 10, 1991 (copy attached hereto as Exhibit J), Star Market's counsel informed the Government that the company would not comply.

IV. Star Market Must comply with the Election Officer's Order[2]

16. The Election Rules have the force of a court order and are "enforceable upon pain of contempt." *United States* v. *IBT,* 742 F. Supp. at 108. Court orders, of course, must be obeyed unless stayed or otherwise set aside. Star Market, however, makes the by now familiar argument that, because it is not a party to this case or to the Consent Decree, the Court lacks the power to redress the company's violation of the court-approved Election Rules. *See* Exhibit J at 1-2. This Court already has rejected precisely the same argument by another employer of IBT members, Yellow Freight System, Inc., that violated the Election Rules. *See United States* v. *IBT,* No. 88 Civ. 4486 (S.D.N.Y. Apr. 3, 1991) ("*Yellow Freight*"), *appeal pending,* No. 91-6096 (2d Cir.); *see*

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2. To the extent that this declaration contains legal argument, the Government respectfully requests that it be treated as a memorandum of law. *See* Civil Rule 3(b) of the United States District Court for the Southern District of New York.

also United States v. *IBT,* 764 F. Supp. 817 (S.D.N.Y. 1991) (rejecting identical argument by Western Conference of Teamsters Pension Trust Fund), *appeal pending,* No. 91-6140 (2d Cir.). Where, as here, a third party had injected itself into the Consent Decree election process by retaliating against an IBT member for participating in that process, the All Writs Act, 28 U.S.C. § 1651, enables the Court to redress that party's violation of the Election Rules. *See Yellow Freight,* slip op. at 3-6; *see also United States* v. *IBT,* 764 F. Supp. at 821-22; *accord United States* v. *IBT,* 907 F.2d 277, 281 (2d Cir. 1990) ("Injunctions may be issued against non-parties under the All Writs Act.").

17. Star Market also argues that an arbitrator's decision that the Company did not violate its collective bargaining agreement with IBT Local 25 when it discharged Henderson preempts consideration of whether the company's action violated the Election Rules. *See* Exhibit J at 2-5. This Court already has rejected a similar argument by an employer of IBT members — that alleged violations of the Election Rules which might also constitute unfair labor practices under the National Labor Relations Act may be adjudicated only by the National Labor Relations Board. *See Yellow Freight,* slip op. at 7-8. Moreover, as the Election Officer and the Independent Administrator pointed out, whether Star Market violated the collective bargaining agreement's overtime provisions and whether the company violated the election campaign activity provisions of the Election Rules are two entirely separate inquiries. *See* Exhibit D at 5-6; Exhibit F at 6-7. No deference to an arbitration award interpreting a collective bargaining agreement is required in adjusting a claim based on an independent source of rights, such as a federal statute. *See, e.g., Barrentine* v. *Arkansas Best Freight Systems,* 450 U.S. 728 (1981) (Fair Labor Standards Act); *Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36 (1974) (Civil Rights Act of 1964). Henderson, as an IBT member, was entitled to assert his rights under the court-approved

Election Rules, which derived from the court-approved Consent Decree settling the Government's case against the IBT under the Racketeer Influenced and Corrupt Organizations Act. Henderson's rights under the Election Rules are entirely independent of his rights under Star Market's collective bargaining agreement with Local 25.

18. Star Market's final argument for ignoring the Election Officer's directive is that the company was denied due process in the determination of Henderson's Election Rules protest. *See* Exhibit J at 5-7. Assuming for present purposes that the due process clause of the Fifth Amendment applies to the determination of protests under the Election Rules, *but see United States* v. *IBT,* No. 91-6052, slip op. at 6775-78 (2d Cir. Aug. 6, 1991) (holding that United States Constitution does not apply to Consent Decree disciplinary proceedings), Star Market got all the process that was due it here. *See Morrissey* v. *Brewer,* 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands"); *accord Lynch* v. *Chrysler Corp.,* 929 F.2d 891, 895 (2d Cir. 1991). Star Market had over three months in which to prepare and submit to the Election Officer evidence and argument in support of its position. *See* Exhibit F at 4-6. The factual issues involved in the protest were not difficult or novel, and, indeed, Star Market already was litigating those facts in the arbitration proceeding. The company also had, and exercised, a right to appeal to the Independent Administrator. Due process requires nothing more.

19. Accordingly, this court should issue an order directing Star Market to comply fully with the Election Officer's order within twenty-four hours.

V. If Star Market Fails to Comply, the Court Should Hold the Company in Civil Contempt and Impose Coercive Sanctions

20. Courts have inherent power to hold persons in civil contempt for violating their lawful orders. *E.g., New York State National Organization for Women* v. *Terry,* 886 F.2d 1339, 1351 (2d Cir. 1989) ; *In re Weiss,* 703 F. 2d 653, 660-61 (2d Cir. 1983); *see also* 18 U.S.C. § 401(3) ("A court of the United States shall have power to punish by fine or imprisonment, as its discretion, such contempt of its authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.").

21. The Second Circuit has summarized the procedural requirements of a civil contempt proceeding as follows:

> A person charged with civil contempt is entitled to notice of the allegations, the right to counsel, and a hearing at which the plaintiff bears the burden of proof and the defendant has an opportunity to present a defense.

United States v. *City of Yonkers,* 856 F.2d 444, 452 (2d Cir. 1988), *rev'd on other grounds*, 110 S. Ct. 625 (1990). Proof of the violation of the court's order must be by "clear and convincing" evidence. *Terry,* 886 F.2d at 1351; *accord Drywall Tapers Local 1974* v. *Local 530, Operative Plasterers & Cement Masons International Association,* 889 F.2d 389, 394 (2d Cir. 1989) For a person to be held in civil contempt for violating a court order, the order must be "clear and unambiguous." *E.g., Drywall Tapers,* 889 F.2d at 394; *Terry,* 886 F.2d at 1351.

22. If Star Market fails to obey an order of this Court directing the company to comply with the Election Officer's directive to reinstate Henderson with full seniority, back pay, and benefits, the company clearly will be in contempt and subject to, *inter alia,* civil

contempt sanctions. Such sanctions may serve either or both of two purposes: "to coerce the contemnor into future compliance with the court's order or to compensate the complainant for losses resulting from the contemnor's past noncompliance." *Terry,* 886 F.2d at 1352; *accord Manhattan Industries Inc.* v. *Sweater Bee by Banff, Ltd.,* 885 F.2d 1, 5 (2d Cir. 1989); *Perfect Fit Industries, Inc.* v. *Acme Quilting Co.,* 673 F.2d 53, 56 (2d Cir.), *cert. denied,* 459 U.S. 832 (1982); *Vuitton et Fils S.A.* v. *Carousel Handbags,* 592 F.2d 126, 128 (2d Cir. 1979).

23. Substantial daily fines *(e.g.,* $10,000 per day) would serve to coerce Star Market's compliance with the Court's order. *See, e.g., Yonkers,* 856 F.2d at 459-60. In addition, an award of attorney fees and other expenses to the Government and the court-appointed officers would serve to compensate them for Star Market's baseless refusal to either comply with the Election Officer's order or appeal it to this Court upon affirmance by the Independent Administrator. *See, e.g., Centerbury Belts Ltd.* v. *Lane Walker Rudkin, Ltd.,* 869 F.2d 34, 39 (2d Cir. 1989); *Vuitton,* 592 F.2d at 130-31.

24. As the Court has previously stated, the Election Rules are the linchpin of the Consent Decree's attempt to cleanse the IBT of La Cosa Nostra's corrupting influence. *United States* v. *IBT,* 742 P. Supp. at 97. Star Market has violated the Election Rules by firing Henderson, a political opponent of Teamsters officials whom the company apparently favors, for engaging in clearly protected union election activity. In addition, Star Market's scorn for the dispute resolution process established by the Election Rules — and approved by this Court and

the Second Circuit – has been as brazen as the company's discriminatory treatment of Henderson. Strong measures are required in response to this outrageous behavior.[3]

WHEREFORE, the Government respectfully requests that the Court enter an order (i) directing Star Market to comply fully, within twenty-four hours, with the Election Officer's order in Election Office Case No. P-760-LU25-ENG; (ii) in the event of Star Market's failure to comply as directed, adjudging Star Market in civil contempt and imposing appropriate coercive sanctions, including substantial daily fines (of at least $10,000 per day), until such time as Star Market complies as directed; and (iii) awarding the Government, the Election Officer, and the Independent Administrator such other and further relief as the Court deems just and proper, including their attorney fees in connection with this motion.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: New York, New York
October 24, 1991

/s/

EDWARD T. FERGUSON, III
Assistant United States Attorney
Southern District of New York

3. The Government is proceeding by order to show cause in order to bring this serious matter to the Court's attention expeditiously and to obtain relief as soon as possible for Mr. Henderson.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, *Plaintiff,*	:	
v.	:	88 Civil 4486
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *Defendant.*	:	October 28, 1991 9:00 a.m.

Before:

HON. DAVID N. EDELSTEIN,
District Judge

APPEARANCES

EDWARD FERGUSON,
Attorney for plaintiff

ROBERT J. BRAY, JR.,
HENRY F. SIEDZIKOWSKI
Attorneys for Star Market

Also Present:

Stuart Alderoty

(Open court)

THE COURT: Yes.

MR. FERGUSON: We are here today on the government's application for an order to show cause which was issued by the court on October 24, 1991. The order to show cause directed that Star Market, an employer of IBT members in Boston, Mass. –

THE COURT: How many IBT members, do you know?

MR. FERGUSON: I do not know how many IBT members Star Market employs.

THE COURT: Is it a large number or small number?

MR. FERGUSON: It is a large company, your Honor, and has many stores in the Boston area and I think it's safe to say it employs at least several hundred, if not more than that, IBT members.

THE COURT: Go ahead.

MR. FERGUSON: Star Market was the subject of a protest filed under the election rules by IBT member Neil Henderson.

Mr. Henderson was a Star Market employee. He is a member of IBT Local 25 in Boston and his protest alleged that he was terminated by Star Market in retaliation for his exercise of rights protected by the consent decree; more specifically, his rights to campaign in the election mandated by the consent decree and his rights to support the candidate of his choice.

It was well known to Star Market that Mr. Henderson was a supporter and is a supporter of IBT presidential candidate Ron Carey and was an opponent of the Local 25 incumbent leadership, the president of which local is IBT general president, William McCarthy.

Mr. Henderson's protest was investigated by the election officer pursuant to the election rules. At the same time Mr. Henderson filed a protest under the election rules, he also filed a grievance pursuant to the collective bargaining agreement between Local 25 and Star Market.

The election officer deferred action for the time being on Mr. Henderson's protest under the election rules, pending the outcome of the grievance procedures under the collective bargaining agreement.

The issue before the arbitrator in the grievance proceeding was whether Star Market's termination of Mr. Henderson was consistent with the language of the collective bargaining agreement between Star Market and the IBT — and IBT Local 25, actually.

The arbitrator ruled that that termination was consistent with the collective bargaining agreement. After that ruling, the election officer resumed his investigation of the separate issue under the election rules raised

by Mr. Henderson's protest, which was whether Mr. Henderson had been terminated in retaliation for exercising rights guaranteed to him by the election rules and the consent decree.

The election officer, upon his investigation, determined that, indeed, Mr. Henderson had been terminated in retaliation for the exercise of those rights. The evidence showed that Mr. Henderson received discipline for taking actions that other employees in exactly the same situation did not receive discipline for. The evidence also showed that Mr. Henderson received discipline that was far more severe, i.e., termination, than discipline meted out on prior occasions by Star Market for similar infractions.

Based on that evidence, and based on Star Market's knowledge of Mr. Henderson's political activities, the election officer concluded that Star Market had violated Mr. Henderson's rights under the consent decree.

Star Market, exercising its rights under the election rules, took an appeal of the election officer's decision to the independent administrator and, pursuant to the procedures under the election rules, a telephone hearing was held on the matter at which Star Market was permitted to make whatever arguments it wanted to make and present whatever arguments it wanted to present with respect to the issue of Mr. Henderson's termination.

The independent administrator affirmed the election officer's decision and also confirmed the remedy imposed by the election officer, which was the following: The election officer, in addition to requiring Star Market to cease and desist from any further acts of discrimination on the basis of the exercise of political rights protected by the consent decree, also directed Star Market to reinstate Mr. Henderson with full seniority, back pay and full benefits.

The company, Star Market, did not, as it could have under the election rules, take an appeal of that decision to this court —

THE COURT: What does that mean? Does that constitute a waiver?

MR. FERGUSON: Well, your Honor, the election rules clearly provide that unless a decision of the independent administrator is either appealed or stayed, or otherwise set aside, it must be followed.

THE COURT: It what?

MR. FERGUSON: Must be followed.

THE COURT: What is the bottom line of that syllogism? They have waived, haven't they?

MR. FERGUSON: There probably is a waiver argument here. However, I don't think the court need even consider that issue because –

THE COURT: I will consider it.

MR. FERGUSON: The court need not reach it if –

THE COURT: I may not have to reach it, but I will consider it.

I don't think anybody in this court can waive willy-nilly and then come here and say we're all right. I don't think the court is required to tolerate that, nor should it.

MR. FERGUSON: What Star Market did –

THE COURT: I am a stickler for rules, as is well known.

MR. FERGUSON: I understand.

THE COURT: I don't believe they have been placed on the books with a view to having them ignored callously, freely and without any possible sanction.

MR. FERGUSON: That's why we're here today, your Honor, to seek some sort of sanction against Star Market.

THE COURT: I am also going to insist that you address some of these arguments in their brief which, I must say, are incredulous in the extreme.

I just pick on one now. Martin against Wilkes. We are still riding that fire engine? I decided that a long time ago, didn't I?

What I find extraordinarily curious by way of supporting it is to cite such an old case. But apart from my own decision and the Court of Appeals affirmance about

my views on the firemen case, under the new Civil Rights Act this is no longer going to have any relevancy whatsoever; is that correct? Or aren't you familiar with the new civil rights bill which at the moment is in compromise, conference, but that is certainly going to remain?

Here we are in this day and age still relying on that firemen's case. What a curiosity. I think this is a rehash of old briefs showing a total ignorance of many of the Court of Appeals opinions. I am astounded, frankly, and I expect you to address this and make a record.

MR. FERGUSON: I will, your Honor.

I just wanted to complete the factual presentation first.

THE COURT: Where has this law firm been? Have they read these opinions? Do they know what they say? Go on.

MR. FERGUSON: As I was saying, the company, Star Market, failed to take an appeal from the independent administrator's decision to this court and, more importantly, for present purposes, failed to obey the decision of the independent administrator which affirmed the decision of the election officer.

Consequently, Mr. Henderson remains out of work and the government is here today to attempt to take steps that will rectify that situation and rectify the violation of the election rules that has occurred.

In defense of its position, Star Market, as your Honor has pointed out, makes a number of arguments that already have been rejected on numerous occasions by this court –

THE COURT: Isn't this a good time to talk about the All Writs Act? Oh, we don't concede jurisdiction, we're just here specially.

MR. FERGUSON: On the issue, first, of personal jurisdiction, which I think is their first point, the Second Circuit made plain in the All Writs Act decision that, in a RICO case such as this, the only contacts that are

required for due process purposes would be United States of America, not contacts with the State of New York.

The analysis advanced by Star Market is the appropriate analysis in cases where the rule of decision is applied by state law, not here, where the rule of decision in the case was supplied by federal law and, as the circuit made clear in the All Writs Act decision, the only context required of Star Market is that they be with the United States of America, and plainly it passes that test.

Moving onto the Martin versus Wilkes argument made by Star Market, the court has held on numerous prior occasions that Martin versus Wilkes is inapposite here. The reason it is inapposite here is that the government is not seeking to hold Star Market to the terms of the consent decree. The government is attempting to prevent Star Market from interfering with a process set in motion by the consent decree; that is, the election of international union officers in accordance with the election rules.

Where, as here, a company like Star Market injects itself into the election process by taking actions that are plainly in violation of the election rules that were plainly made in retaliation for the exercise of rights under the election rules, as this court has held, the All Writs Act allows the court to assert jurisdiction over such an employer for the limited purpose of insuring that that kind of interference does not succeed; that is, does not interfere with the implementation of a consent decree over which the court clearly does have jurisdiction on an on-going supervisory basis.

It is for that reason that the All Writs Act supplies the requisite jurisdictional basis for the limited action taken by the election officer and the independent administrator against Star Market here.

Turning to the due process arguments raised by Star Market with respect to the method of proceeding on protests under the election rules, the first point here is that the election rules have been approved not only by

this court but also by the Second Circuit. If there are any due process problems with the rules, they surely would have been addressed on IBT's appeal from the court's approval of those rules.

I believe the Second Circuit expressly approved the rules as a legitimate exercise of the election officer's supervisory authority under the consent decree. But moving on from that threshold point, one first must reach the issue whether the due process clause of the Fifth Amendment would apply to adjudications of protests filed under the election rules.

The guidance here is supplied by the court's recent decision, that is the Second Circuit's recent decision in the Senese matter, in which it held as to the disciplinary proceedings under the consent decree that the independent administrator's imposition of discipline does not implicate the Constitution because it does not constitute governmental action.

I think the same argument could be made here with respect to the election officer's and the independent administrator's actions under the consent decree's electoral provisions; however the government is willing to presume for present purposes, that is today's discussion, that the due process clause does apply and move onto the question of whether due process was accorded Star Market here – and it plainly was.

The protest that was filed by Mr. Henderson was forwarded to Star Market under cover of a letter from the election officer informing Star Market to submit whatever evidence it had on the issue to him for his consideration during the course of his investigation of the protest. I believe Star Market indeed did submit materials to the election officer for his consideration.

Star Market was informed when the election officer decided to defer further consideration of the protest until the collective bargaining agreement grievance process was completed. Star Market litigated the very facts

underlying the protest under the election rules in the grievance proceeding under the collective bargaining agreement.

The factual scenario was exactly the same. Star Market plainly had ample time to prepare its defense to the collective bargaining agreement proceeding and plainly had ample time to prepare its defense to the protests, given the fact that more than three months elapsed between the filing of the protest and the election officer's decision.

That is much, much more time than ordinarily elapses under the election rules scheme here and the reason for that lapse of time was the election officer's deferral to the grievance proceeding. Star Market also had the right under the election rules – and exercised that right – to take an appeal to the independent administrator, to place before the independent administrator its arguments as to why the election officer had erred.

The election officer's rationale was clearly set forth in the election officer's decision on the matter. The facts relied on by the election officer were set forth. The legal analysis engaged in by the election officer was set forth. Star Market had ample opportunity to reply and to try to rebut that analysis and those facts.

Star Market did make an appearance before the independent administrator. The independent administrator then issued a decision in writing. That decision was forwarded to Star Market. That decision contained the legal basis, and also the factual basis, for the affirmance of the election officer's decision.

Star Market could have, under the election rules, taken a further appeal to this court, presented any evidence it wished to present, made any arguments it wished to make. Star Market, however, declined to seek review from this court.

THE COURT: What should we do about that?

MR. FERGUSON: It at least constitutes a waiver of their due process argument. They had an opportunity to

come forward to the District Court and make their complaint that they had not received appropriate process before the court appointed officers, but they did not.

They cannot be heard at this late day, having done absolutely nothing to rectify the situation themselves, and having to be dragged into court by an order to show cause now having to complain that they were not afforded appropriate due process. So a waiver point at least applies to the due process argument, in the government's view.

The point that Star Market makes, and really its principal point on its appeal, when one cuts through all the arguments that have already been decided by the court, is that it was improper for the election officer not to defer to the decision of the arbitrator, which was made pursuant to the collective bargaining process.

That decision, however, did not implicate the consent decree; it did not implicate, more importantly, the election rules, and it did not decide whether Mr. Henderson had been the subject of retaliation that is outlawed by the election rules on the basis of his political beliefs and the expression of those beliefs.

The arbitrator's decision simply decided whether the action taken by Star Market was in accord with the language of the collect collective bargaining agreement between Star Market and Local 25, as it pertained to overtime periods.

What happened here was that Mr. Henderson left his job station before the expiration of the overtime period he was working prior to the beginning of his regular shift. That was in accordance with past practice of the other employees in the perishables department at the Star Market facility at which Mr. Henderson worked, and it was that past practice that was relevant to the election officer, among other things, in reaching his decision.

However, that past practice was not codified in the collective bargaining agreement and as a result the

arbitrator found that the literal terms of the collective bargaining agreement had been adhered to by Star Market.

The arbitrator simply did not make any finding whatsoever on the issue of retaliation which, of course, was the essence of the protest before the election officer. So it was entirely appropriate for the election officer not to defer to the decision of an arbitrator on an issue that really was not at all central to the issue before him.

Moreover, for the reasons stated in the government's moving papers, it is often, if not always, the case that when a right is asserted that is independent of a collective bargaining agreement, an arbitrator's decision interpreting that collective bargaining agreement does not preclude a complainant from pressing his claims in federal court. That is the law with respect to the Civil Rights Act of 1964 in employment discrimination cases; that is the law with respect to the Fair Labor Standards Act of –

THE COURT: 1938.

MR. FERGUSON: Yes. – and that should also be the law here, where the election officer and the independent administrator were adjudicating rights that did not arise out of the collective bargaining agreement but, rather, arose out of the election rules promulgated pursuant to the consent decree.

Lastly, Star Market makes the arguments that the balance of equities here tips in its favor. First of all, it is difficult to see what relevance that argument has to an order to show cause on the contempt motion, but even assuming that it does have some sort of relevance here, the equities clearly do not weigh in Star Market's favor.

It is vital that violations of the election rules be remedied promptly and surely. Violation of the election rules occurred here. The election officer and the independent administrator so found.

Star Market thumbed its nose at those findings. Star Market cannot be permitted to do that without some action being taken to contradict that kind of violation.

THE COURT: What correction do you seek?

MR. FERGUSON: I wanted to make one more point before I get to that, your Honor.

The IBT membership, the other members of Local 25 and the members of the rank and file generally, must be secure in the knowledge that when the election rules are violated, when their jobs are lost because of their exercise of rights that are guaranteed them by the consent decree and the election rules — not to speak of federal labor law — they must be secure in the knowledge that the government will act swiftly and that the court will act surely to correct those violations, otherwise they will be chilled in the exercise of rights that are guaranteed to them.

What the government seeks is an order from this court directing Star Market, within 24 hours of the issuance of the order, to comply fully with the decision of the election officer.

THE COURT: Spell it out. Explicate more fully.

MR. FERGUSON: What Star Market must do within 24 hours is reinstate Mr. Henderson to his former position with full seniority, full back pay and full benefits, as is his right under the collective bargaining agreement, must do so within 24 hours of the issuance of the order, and it must furnish to the government and to the court proof of its compliance in the form of an affidavit by a suitably high-ranking officer from Star Market.

THE COURT: What proof would be satisfactory?

MR. FERGUSON: A sworn affidavit that Mr. Henderson has been reinstated, together with a copy of a letter to Henderson reinstating him with the requisite full back pay and full seniority and full benefits.

The government also seeks —

THE COURT: Affidavits have limitations. You know that they are hearsay, don't you?

MR. FERGUSON: They are hearsay. They are also sworn under penalty of perjury and anyone executing

such an affidavit subjects himself to a perjury prosecution should he lie in that affidavit.

Of course, the government will be in contact with Mr. Henderson, through his attorney, to insure that he indeed has been reinstated, and if he has not been reinstated, we will, of course, come right back to the court for appropriate severe sanctions. That is what the government seeks by way of relief.

Failing Star Market's obedience to that order of this court, Star Market should be adjudged by this court to be in civil contempt of its order and coercive sanctions should be imposed on Star Market, as the court wishes. The government suggests that an appropriate daily fine would be $10,000 per day until such time as Star Market does bring itself into compliance with the court's order.

Finally, the government seeks by way of compensatory damages for Star Market's baseless violation of the election rules, and the need for the government to seek this court's relief in enforcing those election rules, to be awarded attorney's fees in connection with this motion for an order and for possible contempt, and to the extent that the court officers – that is, the election officer and the independent administrator – have incurred any attorney fees in this connection, they too should be compensated.

That is what the government seeks, your Honor, and that concludes our presentation for the moment.

THE COURT: You wish to remain silent?

MR. BRAY: No, your Honor. My name is Robert Bray. I am the attorney for Star Market, and I was invited here today by –

THE COURT: You were not invited, you were ordered, and I suggest that you be cautious and careful about the language you use. You were not invited, you were ordered to show cause. That was an order of the court.

Now go on with your argument.

MR. BRAY: Your Honor, I would like permission to move to appear before you pro hac vice. We are not a member of the bar of this court.

THE COURT: Do you have local counsel?

MR. BRAY: No, your Honor.

THE COURT: Why not? You know that the rules require it, don't you?

MR. BRAY: Your Honor, I –

THE COURT: Apparently you're not concerned about rules. The rules specifically demand that local counsel be assigned.

MR. BRAY: Your Honor, the order that you rendered –

THE COURT: Go on with your argument. I will consider that, too. I consider that a failure to conduct yourself and to comply with the rules. That is one very specific rule. Others have been fully aware of it. So now you go on and I'll hear your argument.

MR. BRAY: Your Honor, as the papers indicate, we are contesting personal jurisdiction in this case and we are contesting it in the face of the government action in this particular case.

The U.S. Attorney's Office has taken steps here by virtue of the consent order that they filed with this court, and which this court signed, to take state action in this case against Star Market.

You have heard an argument that we have ignored the election officer's rulings – that's true. We have ignored them based on the fact that we feel, based on the law that exists applicable to us, that they are no more than a decision would be of the International Brotherhood of Teamsters. The election officer, the independent administrator, this court has ruled, the Second Circuit has ruled, they are private parties. They have no government force of action.

THE COURT: Are you familiar with the many decisions handed down by this Court of Appeals? Now, before you say quickly yes, I want you to think that I may start quizzing you about those.

Are you familiar with the very numerous decisions handed down by this court and affirmed by the Court of Appeals?

MR. BRAY: Your Honor, I don't know whether I am aware of every one. I have read every one that is reported, including those on Lexis.

THE COURT: Tell me the ones that you are aware of.

MR. BRAY: I am aware of the last decision which dealt with the so-called state action decision, as I believe it has been referenced – Mr. Ferguson called it the Senese decision – and it says that the independent administrator has offices that are provided by the IBT and the IBT pays his salary; thus, the position is under the control of the IBT and remains a private not a governmental role.

THE COURT: That is a decision you're aware of? What other decisions are you aware of?

MR. BRAY: I am aware of the decisions that supported your All Writs opinion. I've read your All Writs opinion. I am aware of both Court of Appeals decisions that have referenced that decision. In both cases, I believe, the Court of Appeals has recognized that these officers appointed by you are appointed as part of the International Brotherhood of Teamsters superstructure. They are involved with governing the internal affairs of that union.

Now, under all applicable law that I am aware of, since I have been practicing labor relations law since 1962, the problems that exist between employers and unions are covered by federal statute. Those federal statutes provide –

THE COURT: Is there an alliance, do you think, between employers and the old guard of the union on the theory "better the devil we know than the devil we don't"?

MR. BRAY: Absolutely not.

THE COURT: I am not convinced of that.

MR. BRAY: I don't know what proof you've had of that effect, but I'll tell you this from my experience, and I've dealt with the –

THE COURT: Why did you fire Henderson?

MR. BRAY: We fired Henderson for stealing time, for being off the job, being off the premises when he was not supposed to be, your Honor. And that is a cardinal –

THE COURT: Did you give him a hearing?

MR. BRAY: Yes, your Honor.

THE COURT: Will you reinstate him?

MR. BRAY: No, your Honor.

THE COURT: Are you willing to hold to that position even if you face contempt?

MR. BRAY: Yes, your Honor.

THE COURT: I am going to give you that opportunity.

MR. BRAY: I would expect that you would hear our legal arguments as to why it's not appropriate in this particular case.

THE COURT: Go on. Immediately, you have told me that under no circumstances are you going to comply with a order of the court.

MR. BRAY: I haven't said that.

THE COURT: That's what you have said. Now go on with your argument.

MR. BRAY: Your Honor, basically, the protest that brings this case in front of the election officer was a protest that took place – and I believe it's in your packet of paper from Mr. Henderson – the only documentation that brings this question of Mr. Henderson's rights in front of the election officer and here today before you, it was a protest that was filed on May 10, 1991, following his discharge by the company.

It says, if I may quote, "This letter is confidential and must be read before pursuing my protest of being discharged. Before pursuing my protest of being discharged, the company has had and will have great advantage at the New England joint area grievance panel because one of McCarthy's candidates, Alfred

Singelias, who we beat, is the co-secretary of the grievance panel, and he chooses the union panelists who will decide my discharge case on 5/22/91. The company knows the situation and may have made a deal with McCarthy loyalists —" underline may have made — "to fix this decision. Star Market will get rid of the steward and McCarthy will get rid of the reform delegate for Carey. I am also in a dilemma that this is a catch-22. I didn't know Jack's position" — Jack was the supervisor who terminated this individual — "until 5/9/91 even though I was sent home 5/2/91. I have to file this protest in time or it will be waived, but if the grievance panel knows that there is any type of pending litigation they will not hear the case —" they will not hear the case — "and I will remain discharged. It is crucial that this protest isn't disclosed until after the grievance panel's decision is rendered to me in writing from Bill Carnes. Please call me for complete details."

That was the only protest. Following that protest — no copy of that was sent to the company, but following that protest on May 14, the office of the election officer sent a letter directed to the supervisor in charge of the grievant, Mr. Henderson.

In this letter, the election officer specifically determines to defer decision on this matter based on — and I read, "Thus, while the election officer will defer his decision on this matter, he has the authority to conduct an independent investigation. The election officer has, pursuant to the rules, jurisdiction and authority to determine the instant protest. He does, however, say under the election rules he is deferring any decision."

What was he deferring decision on? The application of this grievance to the joint committee, the joint committee made up of two parties, union and management. That was his protest, your Honor.

After that deferral took place, the company never heard again from the election officer. Why the company sat and did nothing on this case was that the case went to the joint committee, the committee objected to by Mr.

Henderson. That committee deadlocked. There was no decision made. No decision was made at all. It went up past that committee to an impartial arbitrator who conducted a full hearing in front of all parties, including Mr. Henderson.

The protest that Mr. Henderson filed was moot. There was no decision by that joint committee that he was objecting to. As far as the company was concerned, that protest was gone, done, without force and effect as to anybody's contention.

Now, Mr. Ferguson quotes the election rules, but the election rules specifically provide that the election officer, once he got that protest, could do two things – only two things. He could, within five days – and I am quoting from page 72 of the election rules – "within five days after receipt of the protest, the election officer, or his representatives, shall evaluate the protest and shall..." not "may" but "shall" – "...determine the merits of the protest and, if found meritorious, determine the appropriate remedy."

He did not do that. He has another choice under these rules. He may defer making a determination until after the election and thereby treat the matter as a post election protest. That is it.

Once this election officer decided not to deal with the protest over the joint committee processes, once he made that decision, he has only one choice and that is to wait until after the election.

He didn't do that. Rather, out of the blue, after Mr. Henderson goes through the hearing in front of the arbitrator, at which time he presented virtually every argument available to him, including the fact that he was treated differently than other employees, that the company didn't have a right to discharge him, that they were discriminating against him because he was a union steward, and because he was black, and for every other reason that the company was wrong, he presented that to the arbitrator.

Now, the arbitrator took all those facts and made a decision, and under the Federal Rules, under every concept of labor law known to me from the Supreme Court's decisions, that decision on the merits of Henderson's discharge is final and binding, except the law provides that there is an appeal process under Section 3012, which is 29 U.S.C., Section 185, if there is an appeal.

Here is the book that deals with how that appeal is to be made.

THE COURT: What is the book, U.S. Code what? You said "book"; U.S. Code what?

MR. BRAY: Section – 29 U.S.C., Section 185. I am sorry, your Honor, I thought I said that.

And under that provision, for purpose of this kind of appeal over the merits of the discharge, there are very tight jurisdictional limits. The jurisdictional limits are those of the Federal Rules of Civil Procedure. They are not to an election officer, an election officer who didn't even have before him the merits of that case – not the merits, the procedural objections that Henderson was objecting to.

Now, after the election officer decides on the basis of evidence that no one knows to this day where it came from – no one knows. In our correspondence to the election officer, we asked, so that we would be able to come before you, if necessary, or come before the Federal District Court in Boston, where such a case of appeal of a decision like that has to be brought, what are your facts? How can we rebut those facts that we don't even know about?

Those facts were gathered by the election officer or his representative in some fashion unknown to us; they never contacted this company once during the process. Not a phone call, not a letter, nothing.

He apparently gathered information hither and yon, some of which was distinctly different from what we were presented with in front of the arbitrator. People apparently said different things to him than were said in

front of the arbitrator. But the election officer, based on this one-sided, ex parte evaluation of evidence coming from who knows where, made his decision.

Yes, there was an appeal to the independent administrator reserving the jurisdictional arguments that we believe we had. The appeal was made. It was rejected out of hand, essentially.

Now, we are faced with what to do. We are not here to ignore your Honor's jurisdiction. We simply believe, as it says, that this is not the place to argue this kind of case.

Mr. Ferguson would have your Honor say, ignore this arbitration –

THE COURT: Does that also mean that you felt absolutely free to ignore the rules of the court? Does that mean that the rule requiring you to have counsel here in New York had no meaning to you because you didn't think this court had any jurisdiction? Is that what you're saying?

MR. BRAY: No, your Honor.

THE COURT: But you did ignore the rule.

MR. BRAY: I did not ignore the rule, your Honor.

THE COURT: Do you have local counsel?

MR. BRAY: No, I don't.

THE COURT: You are supposed to.

MR. BRAY: The notice requirements here were virtually outrageous, your Honor.

THE COURT: You ignored the rules. That's clear.

MR. BRAY: I came here on the order of the court.

THE COURT: Go on, finish your argument. You are drawing upon my patience.

MR. BRAY: Basically, what has occurred here –

THE COURT: And I suggest that any time in the future that you come to this court, you have local counsel following you from the very beginning that you decide to come here. If you don't, I will sanction you.

In the future, any time you have any reason to come to this court, make sure you have local counsel. No excuse will be accepted.

MR. BRAY: Your Honor, basically what we have here is a number of arguments that exist with respect to the procedures that are non-existent here today.

In reading, again, what I have read, the reported decisions of this court and of the court above, what is occurring here today is totally contrary to anything that has ever happened before. We are here on a contempt order, an order to show cause why we should not be in contempt, and yet Mr. Ferguson comes forward with no facts; he makes oral argument.

Mr. Ferguson's actions are state actions at this particular point in time. We are, Star Market, irrespective of the –

THE COURT: Does Yellow Freight have any meaning or application for you?

MR. BRAY: I know Yellow Freight. Yellow Freight filed a motion. They appealed. They came before your Honor.

THE COURT: I know, but there has been no decision from the Court of Appeals reversing this court. Accordingly, Yellow Freight is the law.

MR. BRAY: Yellow Freight –

THE COURT: Does it apply to you?

MR. BRAY: We have a different factual circumstance than Yellow Freight. Yellow Freight had operations within this jurisdictional district; Star Market's does not.

Yellow Freight didn't raise the questions of due process that we have raised. Yellow Freight had no ability to say that this court had no in personam jurisdiction over them. We do. Yellow Freight came to you as the movant in this case and had every right to expect that this court would act on their decisions. We believe we have come to you in a different context. We have come to you as a person who is being acted on by governmental action and under those circumstances have a right to claim due process.

Your Honor says in the Yellow Freight case that in appealing the decision of the independent administrator,

Yellow Freight bears the burden of demonstrating that those findings were arbitrary and capricious.

Paragraph K 16 of the consent decree provides that this court shall review actions of the independent administrator using the same standard of review applicable to review the final federal agency action under the Administrative Procedures Act.

Now, if that is the case, then Yellow Freight had a very high burden, a burden which we believe should not be applicable in this particular case.

Your Honor is looking at the existence, like it or not, of a final and binding arbitration award that binds Local 25 of the Teamsters and the IBT.

If the IBT president were to rant and rave over that decision, claiming he did not like that decision, claiming it was wrong in some fashion, the IBT president, the entire board of the IBT, would have only one recourse, to join with Mr. Henderson and/or Local 25 in arguing that that case should be overturned under 29 U.S.C. 185.

That's what their rights would be. I have not read any decision of this court or the court below which would indicate that you believed that there are far broader rights that exist than that.

Your Honor has said, if I might quote him, "No ruling of this court..."

THE COURT: Before you quote, would you like to identify from the record what you're quoting from.

MR. BRAY: Yes, your Honor. This is the decision reported in 728 F.Supp, 1032. I believe this is your All Writs decision, your Honor, I think that's the way it's described by the parties.

"No ruling of this court even intimates that this court has jurisdiction over all litigation involving the international IBT or its hundreds of subordinate entities. For example, should a subordinate entity bring an action in any Federal District Court for breach of the food service contract involving their Christmas party, the court would have absolutely no power or interest in enjoining such litigation."

Now, that is the case. You have not ordered that the IBT or the independent administrator, or anybody else, has the right to go in and deal with every grievance that exists between an employer and a member of the IBT, irrespective of whom they are supporting. That is not what I believe your Honor has done. I have seen nothing to indicate you've done that and nothing that the Federal Court of Appeals has done to support that view.

In this particular case, the arguments that Mr. Henderson raised were all raised at the arbitration hearing. The arbitration hearing resolved those arguments, and under the federal law, those arguments are final and binding on Mr. Henderson, on Local 25 and, to the extent that the IBT has any involvement in that, on the IBT.

In that capacity, the election officer's role in this process is no different than the role of the general president of the IBT. He's a private party and he's seeking to turn over an arbitration decision based on what he, in his own words, says is a weak case of employer discrimination. He said under that weak case, it was enough to make the employer have a burden of coming forward to rebut that.

I remind your Honor of the facts here, however. There was no opportunity for the employer to say anything to the election officer. He was told, the employer was told, that they were deferring the decision on this particular issue.

THE COURT: You know how many times you've said that, the same thing?

MR. BRAY: I think it's important, your Honor.

THE COURT: Repetition is not necessary for illumination. You've said it many times. You are getting paid for time and I'm not. Once the argument is made, get on to another point.

MR. BRAY: Basically, I assume that Mr. Ferguson is finished here today. In his opening statement he has concluded his case.

I have heard no effort to put on any facts in front of your Honor and, at least in the cases that you had that involved other parties, Ligurotis, Friedman, where you did similar action of contempt citations against them, there was a factual hearing. There is no factual hearing today before your Honor, none at all.

I would also suggest, your Honor, that this case can have no other jurisdictional merit, except as a case that sets aside an arbitration award. If your Honor believes that your All Writs decision requires that every case involving an alleged political employee must be brought before you, then it would have to come before you under Section 301. In that particular case, there would be a hearing on the merits with evidence and all rights of appeal appropriate under those circumstances.

There is an attempt here, although Mr. Ferguson ignores it, to set aside an arbitration decision which exists between the company. This is different than the Yellow Freight case. This is a case where Yellow Freight had no arbitration decision, no application to the federal labor law, they simply were doing something the election officer felt interfered with the election.

What is being asked here is to set aside the matter, and I would suggest to your Honor if that is the way it should be done before you, then Mr. Ferguson has the burden, as any union would have, to show to you that there was something wrong with this arbitration decision.

The election officer found nothing wrong with it. He found that the man was properly represented by his union. He found that he had a full hearing and an opportunity to present evidence.

If, however, your Honor believes, as Mr. Ferguson urges, that this is a contempt matter, I would suggest that an order, whichever order you enter, be done in light of what you have done in other cases, the Ligurotis case and, I believe –

THE COURT: The what?

MR. BRAY: In the Ligurotis case, I believe it was an order of $125 a day multiplying.

I would also ask that, under the circumstances here, where there is a very substantial legal question of federal labor law involved as to how your jurisdiction conflicts, if at all, with the federal labor law giving arbitration awards predominance, that you stay any finding of contempt until an appeal. That was done in Ligurotis. The Second Circuit stayed your contempt order and –

THE COURT: Then why don't you conclude by asking me to give you the chance to see if you can stay the contempt, since you're dwelling on that. Isn't that what you're asking now? Haven't you asked that I give you that opportunity?

MR. BRAY: I am making the alternative argument.

THE COURT: You talked about money. Will you tell me the size of your client? Is it a publicly traded corporation?

MR. BRAY: It is a subsidiary corporation of American Stores, which is a publicly traded company. It's a very large company.

THE COURT: Are you finished?

MR. BRAY: One second, your Honor? Yes, your Honor.

MR. FERGUSON: Preliminarily, your Honor, the order to show cause signed by the court directed Star Market to appear by, among others, a "senior management employee of its choosing with full authority to bind the company in this matter."

I think it would be appropriate if whoever fits that description is in the courtroom today to be identified for the record.

MR. BRAY: Your Honor, I brought Mr. Richard McDonald, who is a vice president of Star Market, in charge of the operation in which Mr. Henderson worked. He sits here to my left.

MR. FERGUSON: Responding to Mr. Bray's points in roughly the way they were presented – the order they

were presented: first off, on the issue of personal jurisdiction, Mr. Bray fails to come to grips with the Second Circuit's decision in the All Writs opinion, which specifically rejected the notion that personal jurisdiction does not lie here or that this court does not have personal jurisdiction over entities outside the Southern District of New York. That is set forth at 907 F.2d 181.

On the issue of state action, Mr. Bray has conceded on behalf of his client, Star Market, that the election officer and the independent administrator are, in his view, and in his client's view, simply private parties analogous to the IBT.

Given that concession, there is no basis whatever for an argument by Star Market that the procedures followed by the election officer and the independent administrator implicate the due process clause, which can only be triggered by governmental action.

Mr. Bray points out that in coming before the court today, the government clearly is acting as a governmental actor and there is state action in that regard. But if there are due process arguments to be made, they must be made with respect to the procedure by which the government came to this court, not with respect to the procedure by which the protest filed under the election rules were handled by the election officer and the independent administrator for, as Mr. Bray has conceded on behalf of his client, those entities are, in his view, not state actors but rather private actors.

That is further reason why the due process argument made by Mr. Bray with respect to the procedures followed under the election rules is of no weight whatever.

With respect to the protest in this case, what Mr. Bray read to the court was not the protest that was filed. Exhibit C to the government's moving papers is a letter from Mr. Henderson to the election officer, stamped received May 10, 1991.

I will read the pertinent parts into the record. "Dear Michael H. Holland: I am a Local 25 delegate committed

to nominate Ron Carey for general president, and I was unjustly suspended pending investigation by my employer, Star Market, because I left early for break on Thursday, 5/2/91. On the next Thursday, 5/9/91 at 2:00 p.m., the manager, Jack Kelliher, had completed his investigation and met with my business agent, Bill Carnes, and myself to inform us that he is discharging me for dishonesty, stealing company time. I feel that this punishment is extremely severe and may be, among other things, politically motivated." It's not the complete protest; however, that is the salient part.

What Mr. Bray read to the court was a letter from Mr. Henderson to Mr. Holland, also stamped received May 10, 1991, that refers to the letter that I just read and requests Mr. Holland not to make his protest known prior to the completion of the grievance procedures.

So the assertion by Mr. Bray, on behalf of Star Market, that the protest was about what entity should hear Mr. Henderson's grievance is completely wrong. The protest, as what I read makes clear, was about Mr. Henderson's having been discharged for what he believed were politically motivated reasons.

On the issue whether the election officer was required upon receipt of the protest to do either one of two things, either make a determination then or wait until after the election, two things need be said only. First, the election officer did make a determination. He determined to defer the matter for the time being pending the completion of the grievance proceedings in order to avoid possibly duplicative work.

He was completely entitled to do that under the election rules. Indeed, the election rules – and this is the second point – permit the election officer to act even in the absence of a protest if he believes that the election rules are being violated and that those election rule violations must be remedied.

The election rules do not constrain the election officer to the extent and in the manner urged by Mr. Bray; rather, as this court has recognized, the election

rules are there in order to insure fair, honest and open election and if, in the judgment of the election officer, it is appropriate to take action that is not explicitly specified in the election rules, he may do so and, indeed, the election rules themselves, approved by this court and the Second Circuit, so provide.

On the issue that this is simply an attempt to overturn an arbitration award, two things can be said —

THE COURT: Quoting selectively from the U.S. Code.

MR. FERGUSON: First, your Honor, Mr. Holland did not overturn the arbitration award. The arbitration award stands. It remains the case that whatever Star Market did to Mr. Henderson was, in the judgment of an arbitrator, not a violation of the collective bargaining agreement. That is, however, of no moment to the question whether what Star Market did to Mr. Henderson was a violation of the election rules, and it was that question that the election officer was deciding.

Moreover, even if one were to view this as a matter somehow tied to the arbitration, Mr. Bray fails to come to grips with and, indeed, does not even bother to attempt to distinguish, the cases cited at page 9 of the government's moving papers, in which the Supreme Court has held that courts need not defer to arbitration awards in cases where a complainant who lost an arbitration is asserting rights that are independent of the rights given to him under the collective bargaining agreement.

Those citations are Barrentine versus Arkansas Best Freight Systems, 450 U.S. 728, 1981, dealing with the Fair Labor Standards Act, and Alexander versus Gardener-Denver Company, 415 U.S. 36, 1974, dealing with the Civil Rights Act of 1964.

So, contrary to Mr. Bray's assertion, even if we regard this as a challenge to the merits of an arbitration award, which it plainly is not, even if we were to so regard it, there would be nothing to stop Mr. Henderson from asserting in another forum rights arising from a

different source than the collective bargaining agreement, even if his argument and his assertion or his claim arose from exactly the same factual scenario as the grievance that he lost in arbitration.

On the issue of whether there should be an evidentiary hearing here, perhaps Star Market misapprehends the relief the government is seeking. The government seeks today an order not holding Star Market in contempt but, rather, directing Star Market on pain of contempt to comply with the decision of the election officer and the independent administrator.

If Star Market, as it appears to inform the court that it will do, refuses to abide by that order, the next step will be the imposition of contempt. At that point, there will be no need for an evidentiary hearing. The facts will be clear. There will be an order from the court directing compliance. There will be Star Market's explicit refusal to comply. The order will be clear and unambiguous, it will be marked and made part of the record, and the refusal will be just as clear and unambiguous.

The government need show no more to merit a contempt citation. This is not a proceeding in which we must retry the facts that were found by the election officer –

THE COURT: Such as in Ligurotis, such as in Hughes, such as in some of the other contempt hearings where the issue was very clearly one that had to be defined by an evidentiary hearing and testimony.

MR. FERGUSON: That's correct. In Ligurotis the question was whether the initiation of the Chicago lawsuit by Ligurotis ran afoul of the – that was the question –

THE COURT: Did Ligurotis do the things that he was accused of doing in contravention of the court's order? That was the issue here.

MR. FERGUSON: Correct. That was the issue there. Here the issue will be plain. There will be an order

from the court. There will be plain and explicit disobedience of that order. Nothing more is required for contempt.

THE COURT: And we must recall that Ligurotis did abandon his lawsuit; is that correct?

MR. FERGUSON: That lawsuit was subsequently withdrawn.

With respect to the attempt to distinguish Yellow Freight, the attempt made really is besides –

THE COURT: Yellow Freight was not distinguished, as I understand it, on the law. It was distinguished on the facts.

MR. FERGUSON: That's correct. The attempt to distinguish it is the fact there was no arbitration present in Yellow Freight. However, the importance of Yellow Freight is the court's ruling that under the All Writs Act it may assert jurisdiction over employers of IBT members when those employers take actions to interfere with the implementation of the election rules.

That is no different with Yellow Freight than it is with Star Market here. The fact that Yellow Freight – a fact nowhere found in the record, to my knowledge – does business in the Southern District of New York is completely irrelevant to the holding in Yellow Freight, which had to do with jurisdiction under the All Writs Act.

THE COURT: Now I think there was also some reference to the constitution. I don't think there was any particular identification of what verse, what chapter, what item. However, there has been some reference to it.

MR. FERGUSON: The Constitution of the United States?

THE COURT: No. constitution of the IBT. I am guessing. All I can do is guess and assume that it was the constitution of the IBT, because it's a green covered book; is that correct?

MR. BRAY: No, your Honor. This is the rules for the IBT International Union and –

THE COURT: I am right, it's the constitution.

MR. BRAY: They are the rules that were approved by your Honor.

MR. FERGUSON: The election rules.

THE COURT: You didn't identify it. So now I have it.

MR. FERGUSON: I believe I covered the election rules argument which was that the election officer had only two choices about what he could do here. That is plainly not the case.

THE COURT: The relief that you reflected on the record as what you're seeking, do you also want an amplification of Judge Lacey's decision?

MR. FERGUSON: Yes, your Honor, we would request that as well.

THE COURT: You didn't ask for that.

MR. FERGUSON: We would ask that it be affirmed.

THE COURT: Anything further?

MR. BRAY: Yes, your Honor. One –

THE COURT: No repetition, none.

Will you want an opportunity to be heard.

MR. ALDEROTY: Yes. Stewart Alderoty on behalf of the independent administrator. The independent administrator rises generally to echo the targets which Mr. Ferguson has articulated –

THE COURT: Don't repeat them.

MR. ALDEROTY: I will not repeat them. I want to highlight one specific point. The independent administrator's decision was not a substitution for the arbitrator's decision but, rather, it was a disposition of issues that were not considered by the arbitration panel and in fact could not be considered by the arbitration panel under its limited authority.

The election officer's focus, and the independent administrator's focus as well, was on the allegation that Star Market retaliated against Mr. Henderson because of his political activity; specifically, his support of Ron Carey against the incumbent union leadership supporting the opposition candidate, Mr. Durham.

Following the mixed motive analysis, the framework provided by National Labor Relations Board decisions, the independent administrator found that Mr. Henderson had made out a prima facie case, that he was discharged because of his political activity, activity that is guaranteed and that is protected by the election rules.

The burden shifts to Star Market to demonstrate that it would have discharged Mr. Henderson under the same circumstances, notwithstanding his political activity. An examination of the evidence, specifically Star Market's discharge history, revealed that not a single employee of Star Market had ever been fired or discharged for the same violation here; namely, the, quote, stealing of time, close quote. Accordingly, the independent administrator affirmed the decision of the election officer and, given the background developed in the case, the independent administrator could do nothing less.

THE COURT: And the administrator's opinion and order dated September 18, 1991, which I have read carefully, is clear and unambiguous.

MR. ALDEROTY: Absolutely, your Honor. That's all I have.

THE COURT: Yes.

MR. BRAY: Your Honor, I would like to make it clear that the documentation that was referred to by Mr. Ferguson, where, contrary to my original assertion, there are two protests now in the record, that the first protest is the one I referenced. The second protest appeared, to Star Market's knowledge, for the first time in this pleading, the first time concerning the protest over his discharge.

I am prepared and I was prepared for an evidentiary hearing to present Mr. McDonald to make that point –

THE COURT: There will be no evidentiary hearing. That is off the wall completely. That sort of issue is not before this court at all. When you relied upon Ligurotis and others, they have no similarity to this problem, none. Anybody that is competent ought to be aware of that.

MR. BRAY: The point then is that we are talking about a protest that has surfaced for the first time in front of your Honor in pleadings that were filed on Thursday night by fax.

If you will look at those, your Honor, if you will look at this new protest, although it's dated May 10, just like the other protest, I believe, and I read it, "I believe Jack's mind was already made up because I explained to him that I was conducting union business as a shop steward trying to contact Bill Carnes about issues that Jack brought up at a meeting, Wednesday, 5/1/91."

Contrary to the statement that was made by the representative of Mr. Lacey, those issues were raised in the arbitration proceeding. They were resolved in that arbitration proceeding.

It is simply a misstatement of fact that you just heard. Those issues were raised and resolved by the arbitrator. There are no other issues in this new protest which was not seen before.

Thank you, your Honor.

THE COURT: I will take a brief recess.

(Recess)

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 1
10 Causeway Street - Room 601
Boston, MA 02222-1072 Telephone (617) 565-6700

Star Market
625 University Avenue
Norwood, MA 02062

Nov. 7, 1991

Attn: Richard MacDonald

Re: STAR MARKET
Case 1-CA-28831

Gentlemen:

Enclosed for your information is an exact copy of an Amended Charge filed in the above-captioned matter.

Very truly yours,

/s/ Rosemary Pye

Rosemary Pye
Regional Director

Encl: Amended Charge
Return Receipt Requested

Case assigned to: Carlos Costa-Rodrigues
Attorney
Telephone: 565-6751

cc:
Mr. Neal Henderson
36 Waverly Street
Brockton, MA 02401-3408

AMENDED

FORM EXEMPT UNDER 44 U.S.C. 3512

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case	Date Filed
1-CA-28831	Nov. 7, 1991

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer: Star Market

b. Number of workers employed: 250 in Dist. Cntr.

c. Address (street, city, state, ZIP code): 625 University Ave., Norwood, MA 02062

d. Employer Representative: Richard MacDonald

e. Telephone No: 617-762-8700

f. Type of Establishment (factory, mine, wholesaler, etc.): Retail Warehouse

g. Identify principal product or service: Groceries

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a) subsections (1) and (list subsections): (3) of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (be specific as to facts, names, addresses, plants involved, dates, places, etc.)

See Attachment

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number): Neal Henderson

4a. Address (street and number, city, state, and ZIP code): 36 Waverly Street, Brockton, MA 02401 3408

4b. Telephone No: 508 586 5531

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization):

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By: Neal J Henderson
(Signature of representative or person making charge)

Address: 36 Waverly Street Brockton Ma 02401-3408 508 586 5531 (Telephone No.) (Title if any) 11/6/91 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001)

BEST AVAILABLE COPY

NLRB ATTACHMENT

I have been employed at Star Market since 1977. I have been a steward for Local 25 of the International Brotherhood of Teamsters (IBT) at the Distribution Center in Norwood, Massachusetts since 1985. I actively represented employees as a steward.

I ran for delegate position at the 1991 IBT convention in February 1991 and won the position in March. In April 1991 I let it be known that I was seeking to become a business agent in Local 25. The election will he held in November.

During negotiations for the 1989 collective bargaining agreement for the Distribution Center, as a member of the negotiating team, I strongly advocated that Star Market make Martin Luther King's birthday a paid holiday. Star Market opposed this demand. As a compromise, Star Market agreed to guarantee an employee the day off if the employee took it as a personal day or vacation day.

In January 1990, Jack Kelliher, perishable warehouse supervisor, stated that employees who worked the Sunday-Thursday shift would get Monday off for Martin Luther King day, claiming it was not a regular holiday. I told him that they should get Sunday off since the contract calls for three consecutive days off for Monday holidays. After the business agent interceded, the employees were allowed to take Sunday off.

In January 1991 Frank McGovern, the night shift supervisor, refused employees' requests to take Sunday night off for Martin Luther King day. They were told they had to take Monday night off. When confronted by Paul Thompson, alternate steward, with contract language giving Sunday night shift employees Sunday off, McGovern said he would not let more than three employees have "nigger day off."

After Thompson informed me of McGovern's statement, I approached management, first by calling Martin Scholten, the President of Star Market. He asked me to

meet with Dick MacDonald, Vice President of Distribution. After expressing my doubts about obtaining relief from MacDonald, I agreed to see him first.

At the meeting with MacDonald, besides informing him of McGovern's statement, I told him about other racial incidents, including graffiti in the building that was not removed in an expedited manner and racist statements made by some employees. I told MacDonald that McGovern should be transferred for his comments. MacDonald told me he would conduct a thorough investigation and have another meeting.

At the second meeting MacDonald stated that the bottom line was that McGovern was only repeating someone else's words and that made it all right. I told MacDonald I intended to pursue it further.

At 9:00 p.m. on May 2, 1991, I left my work area for one hour between the time my overtime work was completed and my regular shift began. I did so in order to pick up some medication for a sore throat and head cold and to call my business agent about pending issues. My actions conformed with past practice. I left in full view of employees or supervisors present, and in front of the video cameras that cover the gate.

Upon my return to the work area, McGovern indefinitely suspended me for "dishonesty." On May 9, Jack Kelliher, the Manager, Perishable Warehouse, terminated me. Dick MacDonald sustained the discharge.

I am the only individual that I am aware of who has been terminated for such a minor "infraction". Other, non-activist, employees have received less severe discipline for more serious infractions.

Star Market's actions in terminating me were based on my union activity and were in violation of Sections 8(a)(1) and (3) of the Act.

11

United States Government
NATIONAL LABOR RELATIONS BOARD
Region 1
10 Causeway Street - Room 601
Boston, MA 02222-1072

Telephone (617) 565-670

Star Market
625 University Avenue
Norwood, MA 02062

Oct. 31, 1991

Attn: Richard MacDonald

Re: STAR MARKET
Case 1-CA-28831

Gentlemen:

This is to inform you that a charge, a true copy of which is enclosed, was filed in the above-entitled matter.

This case has been assigned to the Board agent named below. When the Board agent solicits relevant evidence from you or your counsel, I request and strongly urge you or your counsel to promptly present to the Board agent any and all evidence relevant to the investigation. It is my view that a refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily. Full and complete cooperation includes, where relevant, timely providing all material witnesses under your control to a Board agent so that witnesses' statements can be reduced to affidavit form, and providing all relevant documentary evidence requested by the Board agent. The submission of a position letter or memorandum, or the submission of affidavits not taken by a Board agent does not constitute full and complete cooperation.

Enclosed is a form requesting commerce data which should be completed, signed by you and returned in the enclosed envelope addressed to my attention.

Attention is called to your right, and the right of any party, to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the courts. If you choose to have a representative appear on your behalf, please complete NLRB Form 4813 which may be used if you choose to have your agent receive exclusive service of all documents and communications except those expressly excluded. Please note that NLRB, Form 4701 may be executed by your designated representative, but that NLRB 4813 will not be honored unless it is signed by you as a party.

Please be advised that under the Freedom of Information Act, unfair labor practice charges and representation petitions are subject to prompt disclosure to members of the public upon request. In this regard, you may have received a solicitation by organizations or persons who have obtained public information concerning this matter and who seek to represent you before our Agency. You may be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board; their information regarding this matter is only that which must be made available to any member-of the public.

I would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge. Attached is a statement (Form NLRB-4541) briefly setting forth procedures followed in the processing of unfair labor practice charges, which we trust will be helpful to you.

Sincerely,

/s/ Rosemary Pye

Rosemary Pye
Regional Director

Enclosures

Certified No. P 178 121 295
Return Receipt Requested

Board Agent: Carlos Costa-Rodrigues
Telephone: Attorney
565-6751

Form NLRB-501
9-83

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 44 U.S.C. 3512

DO NOT WRITE IN THIS SPACE

Case	Date Filed
1-CA-28831	October 31, 1991

INSTRUCTIONS: File an original and 4 copies of this charge with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer
Star Market

b. Number of workers employed
250 in Dist. Cntr.

c. Address (street, city, state, ZIP code)
625 University Ave., Norwood, MA 02062

d. Employer Representative
Richard MacDonald

e. Telephone No.
617- 762- 8700

f. Type of Establishment (factory, mine, wholesaler, etc.)
Retail Warehouse

g. Identify principal product or service
Groceries

h. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) _____ of the National Labor Relations Act, and these unfair labor practices are unfair practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (be specific as to facts, names, addresses, plants involved, dates, places, etc.)

See Attachment

By the above and other acts, the above-named employer has interfered with, restrained, and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act.

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
Neal Henderson

4a. Address (street and number, city, state, and ZIP code)
36 Waverly Street, Brockton, MA 02401 3408

4b. Telephone No.
508 586 5531

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6. DECLARATION

I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By Neal J Henderson
(signature of representative or person making charge)

(title if any)

Address 36 Waverly Street Brockton, Ma 02401-3408 508 586 5531 (Telephone No.) 10/30/91 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001)

1stAA

BEST AVAILABLE COPY

NLRB ATTACHMENT

I have been employed at Star Market since 1977. I have been a steward for Local 25 of the International Brotherhood of Teamsters (IBT) at the Distribution Center in Norwood, Massachusetts since 1985. I actively represented employees as a steward.

I ran for delegate position at the 1991 IBT convention in February 1991 and won the position in March. In April 1991 I let it be known that I was seeking to become a business agent in Local 25. The election will be held in November.

During negotiations for the 1989 collective bargaining agreement for the Distribution Center, as a member of the negotiating team, I strongly advocated that Star Market make Martin Luther King's birthday a paid holiday. Star Market opposed this demand. As a compromise, Star Market agreed to guarantee an employee the day off if the employee took it as a personal day or vacation day.

In January 1990, Jack Kelliher, perishable warehouse supervisor, stated that employees who worked the Sunday-Thursday shift would get Monday off for Martin Luther King day, claiming it was not a regular holiday. I told him that the should get Sunday off since the contract calls for three consecutive days off for Monday holidays. After the business agent interceded, the employees were allowed to take Sunday off.

In January 1991 Frank McGovern, the night shift supervisor, refused employees' requests to take Sunday night off for Martin Luther King day. They were told they had to take Monday night off. When confronted by Paul Thompson, alternate steward, with contract language giving Sunday night shift employees Sunday off, McGovern said he would not let more than three employees have "nigger day off."

After Thompson informed me of McGovern's statement, I approached management, first by calling Martin Scholten, the President of Star Market. He asked me to

meet with Dick MacDonald, Vice President of Distribution. After expressing my doubts about obtaining relief from MacDonald, I agreed to see him first.

At the meeting with MacDonald, besides informing him of McGovern's statement, I told him about other racial incidents, including graffiti in the building that was not removed in an expedited manner and racist statements made by some employees. I told MacDonald that McGovern should be transferred for his comments. MacDonald told me be would conduct a thorough investigation and have another meeting.

At the second meeting MacDonald stated that the bottom line was that McGovern was only repeating someone else's words and that made it all right. I told MacDonald I intended to pursue it further.

At 9:00 p.m. on May 2, 1991, I left my work area for one hour between the time my overtime work was completed and my regular shift began. I did so in order to pick up some medication for a sore throat and head cold and to call my business agent about pending issues. My actions conformed with past practice. I left in full view of employees or supervisors present, and in front of the video cameras that cover the gate.

Upon my return to the work area, McGovern indefinitely suspended me for "dishonesty." On May 9, Jack Kelliher, the Manager, Perishable Warehouse, terminated me. Dick MacDonald sustained the discharge.

I am the only individual that I am aware of who has been terminated for such a minor "infraction". Other, non-activist, employees have received less severe discipline for more serious infractions.

FORM NLRB-4541
(5-90)

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

NOTICE: PARTIES INVOLVED IN AN INVESTIGATION OF AN UNFAIR LABOR PRACTICE CHARGE SHOULD BE AWARE OP THE FOLLOWING PROCEDURES:

Right to be represented by counsel – Any party has the right to be represented by counsel or other representative in any proceeding before the National Labor Relations Board and the courts. In the event you wish to have a representative appear on your behalf, please have your representative complete Form NLRB-4701. Notice of Appearance, and forward it to the respective regional office as soon as counsel is chosen.

Designation of representative as agent for service of documents – In the event you choose to have a representative appear on your behalf, you may also, if you so desire, use Form NLRB-4813 to designate that representative as your agent to receive exclusive service on your behalf of all formal documents and written communications in the proceeding, except charges and amended charges, and further except subpoenas which are served on the person to whom they are addressed. If this form is not filed, both you and your representative will receive copies of all formal documents, including complaints, orders, and decisions. If it is filed, copies will be served only on your representative, and that service will be considered service on you under the statute. The designation, once filed, shall remain valid unless a written revocation is filed with the Regional Director.

Impartial investigation to determine whether charge has merit – immediately upon receipt of a charge, the regional office conducts an impartial investigation to obtain all the facts which are material and relevant to the charge. In order to determine whether the charge has merit, the Region interviews the available witnesses. Your active cooperation in making witnesses available and stating your position will be most helpful to the region.

The region seeks evidence from all parties. Naturally, if only the charging party cooperates in the investigation, a situation results whereby the evidence presented by the charging party may warrant the issuance of a complaint, in the absence of any explanation from the party charged with having violated the law. Where evidence of meritorious defenses is made available a number of cases are withdrawn or dismissed. Your active cooperation will result in disposing of the case at the earliest possible time, whether the case has merit or not.

If the charge lacks merit, charging party has opportunity to withdraw – If it is determined that the charge lacks merit, the charging party is offered the opportunity to withdraw it. Should the charging party refuse to withdraw the charge, the Regional Director dismisses the charge, advising the charging party of its right to appeal the dismissal to the General Counsel.

If the charge has merit, the matter may be voluntarily adjusted – If the Regional Director determines that the charge has merit, all parties are afforded an opportunity to settle the matter by voluntary adjustment. It is the policy of this office to explore and encourage voluntary adjustment before proceeding with litigation before the Board and courts, which is both costly and time consuming. The Regional Director and members of the staff are always available to discuss adjustment of the case at any stage and will be pleased to receive and act promptly upon any suggestions or comments concerning settlements.

Voluntary adjustments after issuance of complaint – If settlement is not obtained, the Regional Director will issue a complaint which is the basis for litigating the matter before the Board and courts. However, issuance of a complaint does not mean that the matter cannot still be disposed of through voluntary adjustment by the parties. On the contrary, at any stage of the proceeding the Regional Director and staff will be pleased to render any assistance in arriving at an appropriate settlement, thereby eliminating the necessity of costly and time-consuming litigation.

FORM NLRB-4701
(3-83)

NATIONAL LABOR RELATIONS BOARD
NOTICE OF APPEARANCE

STAR MARKET) CASE NO. 1-CA-28831

TO: (Check one Box Only)[1]

☐ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR
RELATIONS BOARD
WASHINGTON, D.C. 20570

☐ GENERAL COUNSEL
NATIONAL LABOR
RELATIONS BOARD
WASHINGTON, D.C. 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF

_____

_____

IN THE ABOVE-CAPTIONED MATTER.

SIGNATURE OF REPRESENTATIVE *(PLEASE SIGN IN INK)*	REPRESENTATIVE'S NAME, ADDRESS, ZIP CODE *(PRINT OR TYPE)*
DATE	AREA CODE TELEPHONE NUMBER

1. IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE.

FORM NLRB-4613
(11-81)

NATIONAL LABOR RELATIONS BOARD

NOTICE OF DESIGNATION OF REPRESENTATIVE AS AGENT FOR SERVICE OF DOCUMENTS

STAR MARKET) CASE NO. 1-CA-28831

TO: Regional Director,

I, the undersigned party, hereby designate my representative, whose name and address appear below and who has entered an appearance on my behalf in this proceeding, as my agent to receive exclusive service of all documents and written communications relating to this proceeding, including complaints and decisions and orders, but not including charges, amended charges, subpoenas, directions of elections or notices of e'ections, and I authorize the National Labor Relations Board to serve all such documents only on said representative. This designation shall remain valid until a written revocation of it, signed by me, is filed with the Board.

Full name of party	Representative's name, address, zip code *(print or type)*	
Signature of party *(please sign in ink)*		
Title		
Date	Area Code	Telephone Number

Form NLRB-4081
(6-82)

NATIONAL LABOR RELATIONS BOARD

QUESTIONNAIRE ON COMMERCE INFORMATION

Form Exempt Under 44 U.S.C. 3512

Please read carefully. Answer all applicable items and return to the Regional Office. If additional space is required, use plain bond paper and identify item number.

CASE NAME

CASE NUMBER

1. TYPE OF BUSINESS
[ ] CORPORATION [ ] PARTNERSHIP [ ] SOLE PROPRIETORSHIP

2. CLASSIFICATION WHICH DESCRIBES YOUR BUSINESS
[ ] WHOLESALING [ ] NEWSPAPER [ ] OFFICE OF INDUSTRIAL BUILDING [ ] RETAIL
[ ] HOSPITAL [ ] HOTEL - MOTEL [ ] MANUFACTURING/PROCESSING [ ] SERVICE ORGANIZATION
[ ] TRUCKING [ ] PUBLIC UTILITY [ ] BROADCASTING STATION [ ] NURSING HOME
[ ] TRANSIT SYSTEM [ ] BUILDING AND CONSTRUCTION [ ] OTHER (Describe)

3. EXACT LEGAL TITLE OF FIRM

4. IF A CORPORATION

A. INCORPORATED IN STATE OF

B. NAME(S) AND ADDRESS(es) OF PARENT, SUBSIDIARY, OR RELATED CORPORATION IF ANY, AND DESCRIBE RELATIONSHIP

5. IF A PARTNERSHIP
FULL NAME AND COMPLETE ADDRESS OF ALL PARTNERS

6. IF A PROPRIETORSHIP
FULL NAME AND COMPLETE ADDRESS OF PROPRIETOR

7. BRIEFLY DESCRIBE THE NATURE OF YOUR BUSINESS (General products furnished or manufactured, or nature of services performed.)

8. PRINCIPAL PLACE OF BUSINESS LOCATED AT

BRANCH(es) LOCATED AT

9. NUMBER OF PERSONNEL PRESENTLY EMPLOYED BY YOUR FIRM
A. TOTAL
B. AT THE ADDRESS INVOLVED IN THIS PROCEEDING

10. DURING THE PAST [ ] CALENDAR [ ] FISCAL YEAR (If Fiscal Year indicate dates) OR [ ] LAST 12 MONTHS (Check appropriate box)

A. DID GROSS REVENUE FROM SALES OR PERFORMANCE OF SERVICES DIRECTLY TO CUSTOMERS OUTSIDE THE STATE EXCEED $50,000 [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT?	$
B. DID GROSS AMOUNT OF PURCHASES OF MATERIALS OR SERVICES DIRECTLY FROM OUTSIDE THE STATE EXCEED $50,000 [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
C. DID GROSS REVENUE FROM YOUR SALES OR PERFORMANCE OF SERVICES EQUAL OR EXCEED $50,000 TO FIRMS WHICH DIRECTLY MADE SALES TO CUSTOMERS OUTSIDE THE STATE AND/OR TO CUSTOMERS WHICH MADE PURCHASES FROM DIRECTLY OUTSIDE THE STATE [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
D. IF THE ANSWER TO 10(c) IS NO, DID GROSS REVENUE FROM SALES OR PERFORMANCE OF SERVICES EQUAL OR EXCEED $50,000 TO PUBLIC UTILITIES, TRANSIT SYSTEMS, NEWSPAPERS, HEALTH CARE INSTITUTIONS, BROADCASTING STATIONS, COMMERCIAL BUILDINGS, EDUCATIONAL INSTITUTIONS AND/OR RETAIL CONCERNS [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
E. DID GROSS AMOUNT OF YOUR PURCHASES EQUAL OR EXCEED $50,000 FROM FIRMS WHICH IN TURN, PURCHASED THOSE GOODS DIRECTLY FROM OUTSIDE THE STATE [ ] YES [ ] NO IF LESS THAN $50,000 INDICATE AMOUNT	$
F. GROSS REVENUE FROM ALL SALES OR PERFORMANCE OF SERVICES (Check largest amount which has equaled or exceeded) [ ] $100,000 [ ] $200,000 [ ] $250,000 [ ] $500,000 [ ] $1,000,000 IF LESS THAN $100,000 INDICATE AMOUNT	$

11. ARE YOU A MEMBER OF, OR PARTICIPATE IN, AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?
[ ] YES [ ] NO (If Yes, give Name and Address of association or group)

12. DID FIRM PERFORM NATIONAL DEFENSE WORK DURING THE PERIOD INDICATED IN 10 ABOVE? [ ] YES [ ] NO $
(If Yes, amount of dollar volume and number(s) and address(es) for which work was performed)

13. PROVIDE NAME & TITLE OF YOUR REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION CONCERNING THE OPERATIONS OF YOUR BUSINESS

NAME	TITLE	TELEPHONE NUMBER

SIGNATURE OR AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE

NAME AND TITLE (Type or Print)	SIGNATURE	DATE

U.S. Government Printing Office: 1982—[illegible]

BEST AVAILABLE COPY

RULES FOR THE IBT INTERNATIONAL UNION DELEGATE AND OFFICER ELECTION

(Revised August 1, 1990)

MICHAEL H. HOLLAND
ELECTION OFFICER

ARTICLE XI

PROTEST AND APPEAL PROCEDURES; REMEDIES; RERUN ELECTIONS

1. Protests and Appeals

a. *Preelection Protests*

Preelection protests shall be processed in the following manner:

(1) Protests regarding the following *must* be filed within forty-eight (48) hours of such protests shall be waived:

(a) Protests regarding rulings on nominator, seconder or candidate eligibility;

(b) Protests regarding alleged failures to provide proper access to the membership, including alleged violations of the rules regarding access to collective bargaining agreements or worksite lists, to Union meetings and publications, or to employer premises; and

(c) Protests regarding alleged improper or inequitable treatment of the candidate or his/her supporters by the Union, by any other labor organization or by an employer, including improper handling of the candidate's request for mailings by the Union, improper or inequitable denial of access to the membership or to relevant information by the Union, by any other labor organization or by an employer, and improper or inequitable aid or support, financial or otherwise, given or denied, a candidate or his/her supporters by the Union, by any other labor organization or by an employer.

(2) Protests regarding alleged improper preelection threats, coercion, intimidation or acts of violence *may* be filed within forty-eight (48) hours or *may* be filed as a

post-election protest pursuant to Subsection "b" of this Article, as if the event complained of occurred on election day.

(3) All preelection protests shall be filed by sending the Election Officer or his representative and the Union(s) involved a clear and concise written statement of the alleged improper conduct. Such statement shall be delivered to the Election Officer or his representative and to such Union(s) by personal delivery, by overnight mail, or by facsimile transmission with a copy sent by regular mail immediately thereafter, within the time limits prescribed by Paragraphs (1) and (2) above and shall include the name(s), address(es), telephone number(s), and Local Union number(s) of the complainant(s).

(4) Within five (5) days after receipt of the protest, the Election Officer or his representative shall evaluate the protests and shall:

(a) determine the merits of the protest and, if found meritorious, determine the appropriate remedy;

(b) defer making a determination until after the election and thereby treat the matter as a post-election protest pursuant to Subsection "b" of this Article, as if such protest was filed on election day; or

(c) with respect to protests regarding rulings on nominator, seconder or candidate eligibility, the Election Officer retains the authority to have the International Union obtain and provide information necessary to assist in resolving the protest.

In any case, the Election Officer or his representative shall notify the complainant(s), the Union(s) involved, any candidate(s) adversely affected, and the Administrator of his decision within the time limit prescribed above.

(5) For all protests not deferred, the complainant(s), the Union(s) involved or any adversely affected candidate(s) not satisfied with the resolution may request a hearing before the Administrator within twenty-four (24) hours after receiving notice of the determination. Such request shall be made in writing and shall be delivered to the Administrator or his designee and to all other parties to the dispute by personal delivery, by overnight mail, or by facsimile transmission with a copy sent by regular mail immediately thereafter, within the time limit prescribed above, with a copy of the original protest attached.

(6) If no appeal is taken from the determination of the Election Officer or his representative, that determination shall become final and binding.

(7) Within three (3) days after receipt of a request for hearing, the Administrator or his designee shall commence and conclude a hearing at a location and in a manner that he determines most appropriate to fully elicit all relevant facts and information necessary to determine the appeal within the three (3) day period. The following individuals may be present at such hearing: the complainant(s) and/or his/her representative(s); any representative(s) of the Union(s) involved; the Election Officer or his representative; the person(s) filing the appeal, if other than the complainant(s), and/or his/her representative(s); and any other person who obtains the permission of the Administrator or his designee.

At each such hearing, the Election Officer or his representative shall present to the Administrator or his designee a summary of the original determination, including a statement of the facts found, the resolution reached and the basis for that resolution.

(8) Within forty-eight (48) hours after the conclusion of such hearing, the Administrator or his designee shall issue a written decision, making whatever findings and ordering whatever relief is appropriate to resolve the appeal. The decision must be followed unless it is stayed or overturned by the Court.

b. *Post-Election Protests*

Post-election protests shall be processed in the following manner:

(1) Protests regarding *any* alleged improper election day or post-election conduct or event *must* be filed:

(a) within seventy-two (72) hours of the posting of the official election tally sheet, when involving any delegate election; or

(b) within fifteen (15) days of the announcement of the election results, when involving the International Officer election.

If the above time limits are not met, the protest shall be waived.

(2) Post-election protests shall only be considered and remedied if the alleged violation may have affected the outcome of the election.

(3) All post-election protests shall be filed by sending the Election Officer or his representative a clear and concise written statement of the alleged improper conduct, including a statement explaining how such conduct may have affected the outcome of the election. Such statement shall be delivered to the Election Officer or his representative and to the Union(s) involved by personal delivery, by overnight mail, or by facsimile transmission with a copy sent by regular mail immediately thereafter, within the time limits prescribed by

– Law Offices –
ELLIOTT, BRAY & RILEY
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS
2700 Centre Square West
Philadelphia, Pennsylvania 19102
215-977-1000
TELECOPIER: 215-557-9670

1225 "I" Street, N.W.
Washington, D.C. 20005
202-486-1620

Suite C-105
8721 Whittier Avenue
McLean, Virginia 22101
703-893-2444

125 State Street
Harrisburg, Pennsylvania 17101
717-232-6200

September 27, 1991

VIA FACSIMILE AND FIRST CLASS MAIL

Mr. Michael H. Holland
Election Officer
Office of Election Officer
c/o International Brotherhood of Teamsters
25 Louisiana Avenue, NW
Washington, D.C. 20001

Frederick B. Lacey, Esquire
Independent Administrator
LeBoeuf, Lamb, Leiby & MacRae
One Gateway Center
Newark, N.J. 07102-5311

Re: Election Office Case No. P-760-LU25-ENG

Gentlemen:

As you know, this firm represents Star Market, Inc. ("Star"). By letter dated September 17, 1991, we entered our appearance. This notwithstanding, we were not copied on the Independent Administrator's affirmance of the Election Officer's determination of the above-referenced protest. Kindly ensure that all future communications with or correspondence affecting Star is directed to our attention.

As you also know, our September 17, 1991, letter contained a statement of Star's position in regard to this proceeding. Among other things stated therein, Star contests the authority and jurisdiction of the Independent Administrator and the Election Officer. Moreover, Star believes that its rights to due process have been grossly violated herein, which rights include but are not limited to the right to be advised of any and all information considered in the "determination" or affirmance thereof, regardless of whether such consideration was direct or indirect.

Accordingly, Star hereby requests that you provide us with a copy of the complete administrative record before the Election Officer and Independent Administrator, as well as citations to any and all caselaw on which you relied. Moreover, given that those cases cited by Mr. Holland in his letter dated May 14, 1991 to Messrs. Henderson, Kelliher and McCarthy as "91 Elec. App. 43 affd. (S.D.N.Y., April 3, 1991)" and "91 Elec. App. 124" are not available to Star, we request that you provide us with copies of those cases. We also require a copy of the entire administrative record relied on by Ms. Karen Anita Keys in connection with her contemplation of moving for contempt sanctions against Star, as stated in her letter dated September 25, 1991 (a copy of which is enclosed). We also expect to be served with any pleadings filed in connection with this matter.

We anticipate receiving the complete administrative record at your earliest convenience. However, in the event that a deadline has been, or will be, established for further proceedings in connection with the underlying protest, or the seeking of any contempt sanctions, we expect to receive the complete administrative record no later than thirty days before any such deadline.

Very truly yours,

/s/ ROBERT J. BRAY, JR.

Robert J. Bray, Jr.

RJB/jb
#534-003
Enclosure
cc: Francis J. Raucci, Esquire (w./enc.)
Mr. Dick MacDonald (w./enc.)
Karen Anita Keys, Esquire (w./enc.)

OFFICE OF THE ELECTION OFFICER
c/o INTERNATIONAL BROTHERHOOD OF TEAMSTERS
25 Louisiana Avenue, NW
Washington, DC 20001

Michael H. Holland
Election Officer

(202) 624-8778
1-800-828-6496
Fax (202) 624-8792

October 1, 1991

VIA UPS OVERNIGHT

Robert J. Bray, Jr., Esq.
Elliott, Bray & Riley
2700 Center Square West
Philadelphia, PA 19102

Re: Election Office Case No. P-760-LU25-ENG, affirmed 91-Elec. App.-187 (S)

Dear Mr. Bray:

I write in response to your letter of September 27, 1991. As you are aware, the Election Officer issued his decision in the above case on September 9, 1991; that decision was affirmed by the Independent Administrator on September 18, 1991. The *Rules for the IBT International Union Delegate and Officer Election,* revised August 1, 1990 *("Rules")* provide at Article XI, § 1(a)(8) that the decision of the Independent Administrator must be followed under it is stayed or overturned by the Court. The Court is defined as the United States District for the Southern District of New York, David N. Edelstein presiding.

The United States District for the Southern District of New York, by the Honorable David N. Edelstein, held that the failure to abide by the *Rules* would constitute contempt of court. That decision has been affirmed by the United States Court of Appeals for the Second Circuit. Accordingly, and in conformity with the provisions of the *Rules* cited above, the Election Officer expects compliance with his decisions, as affirmed by

the Independent Administrator, until or unless the effectiveness of such decision is stayed by Judge Edelstein. Your client, Star Market Company, division of Jewel Companies, Inc., has not sought such a stay. Accordingly, by letter dated September 16, 1991 - a copy of which was sent to you - the Election Officer asked that the United States Attorney for the Southern District of New York institute contempt proceedings.

The request by the Election Officer was in accord with the *Rules* and consistent with prior decisions of both the Independent Administrator and the United States District Court for the Southern of New York finding that the Election Officer and the Independent Administrator had jurisdiction over employers of IBT members such as Star Market and could exercise such jurisdiction to require that discipline actions taken by an employer be reversed. Those decisions were cited by the Election Officer as you note in his letter of May 14, 1991 and copies are enclosed herewith.

The Election Officer has determined, as confirmed by the Independent Administrator, that his investigatory files are confidential, the contents of which are not revealed except upon request of the Independent Administrator or the United States District Court for the Southern District of New York. Without preserving such confidentiality, the Election Officer would be unable toadequately investigate matters which come before him. Such materials are therefore not enclosed with this letter.

Very truly yours,

/s/ MICHAEL H. HOLLAND

Michael H. Holland

MHH/mjv

Enclosures

cc: Edward T. Ferguson, III, Assistant United States Attorney for the Southern District of New York

OFFICE OF THE INDEPENDENT ADMINISTRATOR
c/o LeBOEUF, LAMB, LEIBY & MacRAE
Gateway Center I, Suite 603
Newark, NJ 07102-5311
(201) 643-8000
Fax (201) 622-6693

Frederick B. Lacey
Independent Administrator

October 2, 1991

Edward T. Ferguson, III, AUSA
Southern District of New York
100 Church Street
New York, NY 10007

Re: In Re: Henderson, 91 - Elec. App. - 187 (SA)

Dear Mr. Ferguson:

I have reviewed a copy of Mr. Holland's September 26, 1991, letter to you regarding Star Market Company's failure to comply with the remedy imposed in the above-referenced matter. I join in Mr. Holland's request that your office institute appropriate contempt proceedings against Star Market for its apparent willful failure to comply with the decision.

Very truly yours,

/s/ FREDERICK B. LACEY
Frederick B. Lacey

FBL:dsg

cc: Michael H. Holland, Esq.
Mr. Neal Henderson
Ms. Karen Keys
Mr. Richard MacDonald
Robert J. Bray, Esq.
Francis Raucci, Esq.

OFFICE OF THE INDEPENDENT ADMINISTRATOR
c/o LeBOEUF, LAMB, LEIBY & MacRAE
Gateway Center I, Suite 603
Newark, NJ 07102-5311
(201)643-8000
Fax: (201) 622-6693

Frederick B. Lacey
Independent Administrator

October 2, 1991

Robert J. Bray, Jr., Esq.
Elliott, Bray & Riley
2700 Center Square West
Philadelphia, PA 19102

Re: In Re: Henderson, 91 - Elec. App. - 187 (SA)

Dear Mr. Bray:

I have reviewed your letter of September 27, 1991.

In the first instance, please be advised that a copy of the above-referenced Decision was forwarded to Francis Raucci, the attorney who appeared on behalf of Star Market at the hearing.

As for your request that I supply you with the "complete administrative record before the Election Officer and the Independent Administrator," please be advised that it has been my practice, from the outset of my appointment as Independent Administrator, not to distribute copies of materials from my files. As a courtesy, however, I have enclosed herewith copies of election appeal decisions that were cited in the above-referenced case. As I recognize you may have difficulty obtaining these from other sources, I am supplying them to you.

Very truly yours,

/s/ FREDERICK B. LACEY
Frederick B. Lacey

FBL:dsg
Enclosures

cc: Michael H. Holland, Esq.
Francis Raucci, Esq.
Ms. Karen Keys

U.S. Department of Justice

United States Attorney

Southern District of New York

100 Church Street
New York, New York 10007

October 3, 1991

BY FEDERAL EXPRESS

Robert J. Bray, Jr., Esq.
Elliott, Bray & Riley
2700 Centre Square West
Philadelphia, Pennsylvania 19102

Re: United States v. International Brotherhood of Teamsters, 88 Civ. 4486 (S.D.N.Y.) (DNE)

Dear Mr. Bray:

This Office represents the United States of America (the "Government") in this racketeering action pending before the Honorable David N. Edelstein in the United States District Court for the Southern District of New York. The court-appointed Election Officer, Michael H. Holland, has requested us to contact you in connection with Election Officer Case No. P-760-LU25-ENG. That case arose out of a protest concerning your client, Star Market, filed by a member of IBT Local 25 under the Rules for the IBT International Union Delegate and Officer Election (the "Election Rules"). The Election Rules were promulgated by the Election Officer pursuant to a Consent Decree between the Government and the IBT and have been approved by Judge Edelstein and the United States Court of Appeals for the Second Circuit. *See United States* v. *IBT,* 742 F. Supp. 94 (S.D.N.Y. 1990), *aff'd*, 931 F.2d 177 (2d Cir. 1991). The

Election Rules are "enforceable upon pain of contempt." 742 F. Supp. at 108.

The protest concerning Star Market centered on its discharge of one of its employees, IBT Local 25 member Neal Henderson, on May 13, 1991. Mr. Henderson alleged that he was discharged in retaliation for his participation in the IBT International Union election process established by the Consent Decree and supervised by the Election Officer, as well as for his support of Ron Carey, a candidate for IBT General President. After an investigation the Election Officer, in a September 9, 1991 decision, concluded that Star Market's discharge of Mr. Henderson was in retaliation for his exercise of political rights protected by Article VIII, Section 10(a) of the Election Rules and, accordingly, ordered Star Market to, *inter alia*, reinstate Mr. Henderson immediately with full back pay and seniority and full restoration of all other benefits. Pursuant to Article XI, Seciton 1(a)(5) of the Election Rules, Star Market appealed the Election Officer's decision to the court-appointed Independent Administrator. In a September 18, 1991 decision, the Administrator affirmed the Election Officer's decision in all respects. 91 Elec. App. 187 (SA). The Election Officer has informed me that you have taken the position that your client will nevertheless not comply with the Election Officer's remedial orders.

Based upon our review of the Election Officer's and the Independent Administrator's decisions, it plainly appears to the Government that Star Market, in discharging Mr. Henderson, acted in blatant retaliation for his exercise of his rights to participate in the IBT International Union election process and to support the union officer candidates of his choice. Further, Star Market's refusal to abide by these decisions is as inexcusable as its treatment of Mr. Henderson.

The Government will not tolerate the company's continued noncompliance, which constitutes contempt. Please be advised that unless this Office and the Election Officer receive a sworn affidavit of compliance from

Star Market by 5:00 p.m. E.S.T. on Monday, October 7, 1991, the Government will initiate civil contempt proceedings before Judge Edelstein, whose jurisdiction in this case extends nationwide. *See, e.g., United States* v. *IBT*, 907 F.2d 277 (2d Cir. 1990); 18 U.S.C. §1965(d); 28 U.S.C. §1651(a). The coercive and compensatory sanctions that the Government will seek may include orders (i) imposing substantial daily fines (*e.g.*, $25,000 per day) on Star Market until such time as it complies with the Election Officer's directives; (ii) directing the U.S. Marshal's Service to arrest and incarcerate the Star Market official(s) responsible for the company's noncompliance until such time as the company complies with the Election Officer's directives; and (iii) awarding the Government and the Election Officer their costs and expenses, including attorney fees, incurred by reason of the company's noncompliance.

If you would like to discuss this matter further, please contact the undersigned.

Very truly yours,

OTTO G. OBERMAIER
United States Attorney

By: /s/ EDWARD T. FERGUSON, III
EDWARD T. FERGUSON, III
Assistant United States
Attorney
Tel. No.: (212) 385-6321

cc: Michael H. Holland, Esq.

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October 10, 1991

VIA TELECOPIER AND FIRST CLASS MAIL

Edward T. Ferguson, III
Assistant United States Attorney
U.S. Department of Justice
United States Attorney's Office
100 Church Street
New York, NY 10007

RE: United States v. International Brotherhood of Teamsters, 88 Civ. 4486 DNE (S.D.N.Y.)

Dear Mr. Ferguson:

As you know this firm represents Star Market, Inc. ("Star"), which has its offices and principal places of business in the Boston, Massachusetts area. As we indicated in our conversation on Tuesday afternoon, October 8, 1991, we are in receipt of your letter dated October 3, 1991, and would like to take this opportunity to outline further our positions which we discussed with you on the telephone. We are also available to discuss these or any other issues at greater length by telephone or in person.

As I stated to you, it must be noted at the outset that Star does no business whatsoever in the Southern District of New York, or even in the State of New York. No acts or proceedings involved in this situation have any nexus with or connection to the Southern District of New York, all having taken place in the Boston area of Massachusetts. I fully realize that this fact is not considered important to either the Election Officer or to the

Independent Administrator, but I respectfully suggest that it should be important to you in the context of your threat to seek a civil contempt citation against Star. I also realize that Judge Edelstein's "All Writs Opinion", *United States v. IBT*, 728 F.Supp.1032 (S.D.N.Y. 1990), *aff'd*, 907 F.2d 277 (2d Cir. 1990), purportedly has created very broad Consent Decree related jurisdiction before him. It has not, however, changed the basic requirements of federal court jurisdiction as established by Congress or by the Federal Rules of Civil Procedure.

It is likewise clear that star has no affiliation with the IBT or with *any other party* to the above-referenced litigation. In fact, Star has no *contractual relationship* with the International Brotherhood of Teamsters or with any other party to the above litigation. Star certainly never signed the "Consent Decree", nor did any party purporting to represent an interest comparable to Star's ever participate in the litigation or sign the Consent Decree. Likewise, Star was not provided with a copy of the Consent Decree prior to the action complained of by the Election Officer. Again, while I understand that none of these points have had any persuasive influence on Messrs. Holland or Lacey, or as our conversation indicated, on you, I would respectfully suggest that the basic jurisdictional facts should be given substantial consideration by you prior to threats of saddling uninvolved parties with "civil contempt".

Star did, and continues to, object to the proceedings relative to it before both the Election Officer and Independent Administrator on a number of grounds as more fully set forth below. Moreover, Star would respectfully suggest that any disagreement between Star and Messrs. Holland and Lacey concerning the interpretation of Judge Edelstein's orders is based on the apparent conflict between those orders and long-standing principles of labor law, as established by the Supreme Court of the United States – not on any "contempt" of the Court. Surely, such principled disagreement should not bring with it the threat of contempt proceedings. This is

especially true where, as here, Star is not in violation of any court order against it. Neither the Election Officer nor the Independent Administrator have asserted any basis for claiming jurisdiction over Star, other than the Consent Decree. They do not cite any authority, much less any order of Judge Edelstein directed to Star (or any other employer for that matter), which could support attempts to vacate the *results* of the arbitrator's final and binding decision in the instant matter. Messrs. Holland and Lacey appear to believe that the final and binding decision of an arbitrator are "irrelevant to them." In our conversation, you appeared to be agreeing with them in this conclusion. Agree with him or not, the Arbitrator found that Mr. Henderson was discharged by Star for "good cause" under the Star – Local 25 collective bargaining agreement. The arbitrator's conclusion is binding on Star, Local 25 and the grievant, Henderson. Much as they would like to do so, Messrs. Holland and Lacey cannot simply ignore that finding, or the fact that this conclusion was based on many (but not all) of the same facts relied on by the Election Officer.

You must recognize that for more than thirty years, arbitration has been the lynchpin of labor-management relations in the collective bargaining relationship. The Supreme Court, in the *Steelworkers* trilogy, concluded that arbitration, as a final and binding method of resolving industrial disputes, is the cornerstone of federal labor policy. *See Steelworkers v. American Mfg. Co.,* 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 524 (1960); *AT&T Technologies v. Communications Workers,* 475 U.S. 643 (1986). Furthermore, it is a settled principle of federal labor law that a judge, state or federal, *cannot* unilaterally substitute his judgment for the bargained-for judgment of an arbitrator – even where the judge would have taken a contrary view of the facts and/or the law. *Warrior & Gulf,* 363 U.S. at 578, 598-99 ("It is the arbitrator's construction [of the labor contract] which was bargained for; and so far as the arbitrator's decision concerns

construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his."); *Paperworkers v. Misco,* 484 U.S. 29 (1987) *A fortiori*, a non-contractually, non-legislatively created official, such as the Election Officer or the Independent Administrator, can not simply reject an arbitrator's final and binding decision to substitute a result more in tune with those officer's personal agendas.

In addition, familiar statutory authorities and Supreme Court's precedent require that an individual allegedly affected by a defective arbitral award, such as Mr. Henderson, must pursue prescribed channels of redress. *See* Section 301 of the Labor-Management Relations Act ("LMRA"), 29 U.S.C. §185; *Smith v. Evening News Assoc.,* 371 U.S. 195 (1962); *Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962); *Charles Dowd Box Co. v. Courtney,* 368 U.S. 502 (1962). Outside of the NLRB, Section 301 is the *exclusive* means of challenging the result of a collectively bargained dispute resolution process.[1] That is, Section 301 mandates the application of a *uniform* federal labor law and, therefore, preempts the application of inconsistent labor rules to disputes such as this. *Lucas Flour*, 369 U.S. at 104; *Allis Chalmers v. Leuck,* 471 U.S. 202 (1985).

In this case, Henderson (through the Election Officer) clearly seeks to avoid the preemptive scope of Section 301 by resorting to the "forum" created by the Election Rules and by attempting to have his Section 301 claim resolved by the Election Officer and the Independent Administrator. Assuming *arguendo*, that

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1. Under the "deferral doctrine", the NLRB will defer to the decision of an arbitrator if that decision considers the factual and/or statutory basis of a potential unfair labor practice. *Olin Corporation*, 228 NLRB 88 (1977). In this case, the arbitrator expressly considered Mr. Henderson's claims of retaliation and "disparate treatment". Therefore, deferral would even have been appropriate for the NLRB.

the Election Officer and/or the Independent Administrator have jurisdiction over Star, such jurisdiction would not destroy Section 301's preemptive sweep nor would it authorize those creatures of contract (the Consent Decree) to rewrite decades of federal labor law and policy. Both the Election Officer and the Independent Administrator have demonstrated their disdain for the Supreme Court's requirement for a uniform federal labor law by attempting to create their *own* inconsistent and capricious brand of industrial justice. Hopefully, you will perceive the errors of their ways.

Pursuant to the contractually mandated grievance procedure, Star employee Neal Henderson's discharge grievance was submitted to arbitration pursuant to all applicable principles of federal labor law. Mr. Henderson, represented by Local 25, had a full and complete opportunity to argue his case and present evidence to support that case; Star had a similar opportunity. During that hearing the union and Mr. Henderson argued to the arbitrator that Star had treated Henderson unfairly by imposing a harsher level of discipline against him than against other Star employees. The union cited cases allegedly involving such "disparate treatment," including one where six employees supposedly received less discipline for the same offense. Star had an opportunity to rebut this claim, pointing out the difference between the cases cited and Mr. Henderson's. Mr. Henderson also argued that he had been discriminated against by Star because of his "race", because of union activities as a "steward", and because he was running as a "delegate". After listening to all the evidence, including the "disparate treatment" claim, the Arbitrator ruled, that Henderson's discharge by Star was justified under the contract.

As set forth above, there is no known labor law precedent for the Election Officer simply to substitute his judgment on so many issues of fact for that of the Arbitrator, as bargained for in the collective bargaining agreement. The Election Officer's action is especially

repugnant, because he, pursuant to an apparent *secret* investigation and "review" of the grievance proceedings and *other* facts *unknown* to Star, has concluded that the Local 25 officials had properly and adequately represented Mr. Henderson in those proceedings. See *In re: Neal Henderson and Star Market and IBT Local Union No. 25,* No. P-760-LU25-Eng. *Election Officer Summary,* at p. 2.[2] Nevertheless, the Election Officer has concluded, based on his *ex parte* review of the facts (known only to him), that Star had somehow treated Mr. Henderson in a fashion different than other Star employees had been treated. This "disparate treatment" argument had, as we stated, already been raised before the Arbitrator and rejected by the him. Such blatant second guessing of the Arbitrator's holding on the "just cause for discharge" issue is exactly the conduct expressly prohibited by the Supreme Court.

Quite simply, this proceeding was and is an impermissible collateral attack on the Arbitrator's decision — no matter how desperately the Election Officer and Independent Administrator would like to deem themselves equal to NLRB or the EEOC, both of which under rigorous procedural requirements and appellate review. Congress did not appoint the Election Officer nor the Independent Administrator to the role of "super ombudsman" over all Teamsters' grievances, irrespective of the political activity of the person(s) involved. The attempt of the Election Officer and the Independent Administrator to convert themselves into independent, omniscient overseers of Teamster-related labor disputes is contrary to every recognized precept of labor law and must be stopped.

Thus, because of the existence of a final and binding arbitral decision, this case is entirely different from the *Yellow Freight* case, previously decided by Judge Edelstein. In that case the supremacy of arbitration was not

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2. This entire issue will be discussed more fully below in the "due process" discussion.

implicated and there was no Election Officer decision directly contrary to the decision of an arbitrator. No matter how easily the interpretive process could purportedly be assumed by the Election Officer in the absence of a final and binding arbitral decision, as in *Yellow Freight*, that option was not here available.

The Henderson protest is also very different from *Yellow Freight* from a "due process" point of view. The entire process utilized by the Election Officer in this case is replete with flagrant abuses of Star's constitutional right to due process. As stated above, the Election Officer conducted his entire investigation in secret with no notice to Star. Moreover, the Election Officer:

> (a) changed the issues being reviewed (without notice to Star) after the "protest" by Mr. Henderson was filed;
> (b) failed to notify Star of the "changed" nature of the investigation being carried out;
> (c) failed to apprise Star of the evidence that was presented against it; and
> (d) denied Star the right to oppose or confront adverse witnesses or evidence presented against it.

The facts of this case demonstrate the Election Officer's disregard for Star's basic due process rights. On March 15, 1991, the Election Officer informed Star that he would defer his decision on the Henderson "protest" until the contractual dispute resolution process had been completed. That protest, See Exhibit was, not a broad protest over his "discharge", but rather a narrow protest over submission of the discharge case to the Joint Committee. That protest effectively became moot, when the Joint Committee "deadlocked" on the case, and the case was referred to an independent, impartial for resolution. No other protest was filed to Star's knowledge. Star had *no contract* with the Election Officer until September 10, 1991, when it received the Election Officer's *decision* "revers[ing] the discharge and order-[ing] Mr. Henderson reinstated." Star was given only *24*

hours to appeal this *ex parte* decision to the Independent Administrator. On September 16, 1991, the Independent Administrator conducted a "hearing" in this matter via telephone. On September 18, 1991, the Independent Administrator "affirmed the Election Officer's decision. Thus, based on the results of a secret *ex parte* proceeding, Star was tried and convicted in a week – without any knowledge of the *ex parte* evidence used against it. For example, the Election officer apparently relies on some evidence submitted by or on behalf of a William Crawford. Although Mr. Crawford did not attend the Arbitration hearing and testify, a written statement by him was submitted to the Arbitrator and the Star representative had an opportunity to view and rebut it. See Exhibit B, page . Yet, if one reviews what the Election Officer concluded in his opinion, based on *his* Crawford testimony (See page 5), it is clear that there is no resemblance between the two. See Exhibit C. Likewise, the Election Officer relied on information from an "employee" by the name of John Darcey.

> John Darcey, an employee of Star Market assigned to the perishable division, was also working the early overtime shift with Mr. Henderson on May 2, 1991 (See page 6)

No-one by the name of John Darcey appeared as a witness or submitted statements at the arbitration hearing. In fact, no-one by the name of John Darcey was/is employed for Star in the perishable division or elsewhere in the warehouse. Again Star is facing evidence developed and evaluated in an *ex parte* setting, with not even the slightest consideration of Star's rights.

Their decisions were rendered – overriding almost every fact found by the Arbitrator – Star was simply advised to comply or else. Thereafter, notwithstanding the important federal labor law issues involved, the Election Officer and Independent Administrator quickly urged you to seek contempt against Star based on their questionable decisions. This high-handed abuse of

Star's right to due process must not be endorsed by the Office of the United States Attorney. Additionally, the recent refusals of the Election Officer and Independent Administrator to provide Star with the complete their administrative record to which Star is entitled pursuant to any known principles of federal law, continues the blatant disregard for Star's due process rights. This infringement is especially oppressive because it restricts Star's inability to point out the Election Officer's and the Independent Administrator's complete lack of substantive evidence to you or to the Court.

At all times Star had acted properly in complying with its contractual obligations set forth in the collective bargaining agreement. As previously stated, the Arbitrator had rendered a binding decision in this matter. The subsequent collateral attack by the Election Officer and the Independent Administrator should be of no consequence to Star. Furthermore, the Independent Administrator's and Election Officer's unilateral determinations that the arbitration decision is of no consequence, that the grievance proceeding does not in any way restrict or govern their discretion, and that a protester's rights under the Election Rules supersede any rights or determinations pursuant to the collective bargaining agreement are without any basis in fact or law. This decision should thus be set aside.

While it is possible that you in your role as Assistant United States Attorney, responsible for monitoring the Consent Decree, may not choose to accept Star's interpretation of the law as applied to these facts, it should be clear that Star's refusal to abide by these decisions is not the kind of conduct of which "civil contempt" is made. This is especially true in view of the fact that several of the issues on which Star relies in support of its position are presently before the Second Circuit Court of Appeals in the *Yellow Freight* case. Under these circumstances, the only prudent course of action, should you even choose to accept such decisions, is to seek judicial approval of the decisions of the Election Officer and

Independent Administrator in a manner similar to the review and enforcement process followed in appeals from the decision of the NLRB.

Should you reject our request for further discussion on this subject and determine to pursue some sort of *enforcement* proceedings against Star, on some as yet undisclosed legal basis for the United States Attorney's office becoming involved in private labor disputes, we request that, pursuant to Judge Edelstein's pre-motion conference rule, you kindly advise us in advance of your intent to seek relief from the Court. At that time we will make a special appearance at such conference without waiving jurisdiction, or any objections, in order to contest any jurisdiction of the Court and other related issues with the Court.

Very truly yours,

/s/ ROBERT J. BRAY, JR.
Robert J. Bray, Jr.

CC. Election Officer
Independent Administrator

RJB/lg

Supreme Court, U.S.
FILED
MAY 21 1992
OFFICE OF THE CLERK

(3)

No. 91-1674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Respondent,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA;

[Defendants continued on inside front cover]

STAR MARKET COMPANY,

Petitioner

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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14

[Defendants continued from front cover]

ANTHONY SALERNO, also known as Fat Tony; MATTHEW IANNIELLO, also known as Matty the Horse; NUNZIO PROVENZANO, also known as Nunzi Pro; ANTHONY CORALLO, also known as Tony Ducks; SALVATOR SANTORO, also known as Tom Mix; CHRISTOPHER FURNARI, SR., also known as Christie Tick; FRANK MANZO, CARMINE PERSICO, also known as Junior, also known as The Snake; GENNARO LANGELLA, also known as Gerry Lang; PHILLIP RASTELLI, also known as Rusty; NICHOLAS MARANGELLO, also known as Nicky Glasses; JOSEPH MASSINO, also known as Joey Messina; ANTHONY FICAROTTA, also known as Figgy; EUGENE BOFFA, SR.; FRANCIS SHEERAN; MILTON ROCKMAN, also known as Maishe; JOHN TRONOLONE, also known as Peanuts; JOSEPH JOHN AIUPPA, also known as Joey O'Brien, also known as Joe Doves, also known as Joey Aiuppa; JOHN PHILLIP CERRONE, also known as Jackie the Lackie, also known as Jackie Cerrone; JOSEPH LOMBARDO, also known as Joey the Clown; ANGELO LAPIETRA, also known as The Nutcracker; FRANK BALISTRIERI, also known as Mr. B; CARL ANGELO DELUNA, also known as Toughy; CARL CIVELLA, also known as Corky; ANTHONY THOMAS CIVELLA, also known as Tony Ripe; GENERAL EXECUTIVE BOARD, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; JACKIE PRESSER, General President; WELDON MATHIS, General Secretary-Treasurer; JOSEPH TREROTOLA, also known as Joe T, First Vice President; ROBERT HOLMES, SR., Second Vice President; WILLIAM J. MCCARTHY, Third Vice President; JOSEPH W. MORGAN, Fourth Vice President; EDWARD M. LAWSON, Fifth Vice President; ARNOLD

WEINMEISTER, Sixth Vice President; JOHN H. CLEVELAND, Seventh Vice President; MAURICE R. SCHURR, Eighth Vice President; DONALD PETERS, Ninth Vice President; WALTER J. SHEA, Tenth Vice President; HAROLD FRIEDMAN, Eleventh Vice President; WALTER J. COX, Twelfth Vice President; DON L. WEST, Thirteenth Vice President; MICHAEL J. RILEY, Fourteenth Vice President; THEODORE COZZA, Fifteenth Vice-President; DANIEL LIGUROTIS, Sixteenth Vice-President; and SALVATOR PROVENZANO, also known as Sammy Pro, former Vice-President,

Defendants

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No. 91-1674

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA,

Respondent,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA; et al.

STAR MARKET COMPANY,

Petitioner

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

This petition joins the ranks of the petitions for certiorari from a legion of cases decided by the Court of Appeals for the Second Circuit arising out of the Consent Decree entered on March 14, 1989 seeking to rid the International Brotherhood of Teamsters ("IBT") of its domination by organized crime. The central purpose of that Decree was to insure the fair and open conduct of the 1991 IBT election, as a means of freeing the IBT's governing board from the grip of La Cosa Nostra. *U.S. v. IBT (Yellow Freight)*, 948 F.2d 98, 100 (2d Cir. 1991). Michael H. Holland, a private

attorney, was appointed to supervise that election process as the Election Officer.

Mr. Holland promulgated a comprehensive set of rules to govern the election. These rules, entitled the Rules for the IBT International Union Delegate and Officer Election ("Election Rules"), were approved with some modification by both the District Court and the Court of Appeals, *U.S. v. IBT*, 742 F.Supp. 94 (S.D.N.Y., 1990), *aff'd.* 931 F.2d 177 (2d Cir. 1991). The Election Rules protected the right of IBT members to participate in the Election Process and permitted the Election Officer to respond to conduct which prevented a fair, honest and open election. *See, e.g. U.S. v. IBT*, 776 F.Supp. 144 (S.D.N.Y. 1991).

The 1991 IBT election has now been concluded. The results of the election have been certified and the new officers of the IBT installed.

During the course of the now completed 1991 IBT election, Petitioner Star Market Company ("Star Market") was alleged to have discharged one of its employees, Neal Henderson, because of its animus against him for his participation in the 1991 supervised election. Mr. Henderson personally and successfully sought election as a delegate to the IBT International Union Convention committed to the nomination and election of Ron Carey for General President of the IBT. His candidacy was opposed by William J. McCarthy, the incumbent General President of the IBT and President of Mr. Henderson's Local who supported a different candidate for the IBT presidency. (A. 11, 26, 138).[1]

Star Market was notified of the pendency of the claim against it, advised of the legal bases under which its conduct could be challenged and notified of the procedures for

[1] All references are to the Appendix to the Petition for Writ of Certiorari filed by Star Market.

supplying documentary and other evidence to contest the claim. (A. 16, 140). The Election Officer's decision issued in September, 1991. He found that Star Market had discriminated against Mr. Henderson because of the extent and political content of the activities undertaken by him in accordance with the March 14, 1989 Consent Decree. Mr. Holland refused to defer to a prior arbitration award finding the discharge valid, relying, in part, on documentary evidence antedating the award date. He also cited decisions of this Court finding deferral inapposite when dealing with rights not emanating solely from the labor agreement.

Based on prior decisions of the District Court—as affirmed by the Court of Appeals for the Second Circuit, *U.S. v. IBT*, 907 F.2d 277 (All Writs Order) (1990) and *U.S. v. IBT*, 948 F.2d 100 (Yellow Freight) (1991)—remedial relief against Star Market was found appropriate to prevent it from interfering with the Consent Decree mandate of a free and fair election. Clearly employment discharge, threatened discharge or even the possibility of such discipline of election activists based on their opposition to incumbent union officials effectively forecloses member election participation and accordingly prevents implementation of the Consent Decree.

Star Market appealed the decision of the Election Officer to the Independent Administrator. After hearing, the Independent Administrator in a written decision affirmed. Star Market received a further hearing before the District Court and appealed from that decision to the Court of Appeals for the Second Circuit.

ARGUMENT

I. THE ELECTION IS OVER.

The matters over which Petitioner seeks review arose in the context of the 1991 IBT International Union election and the Election Rules promulgated to govern that election. The election is over; the results have been certified. The next IBT election will occur in 1996.

While the instant cause is concededly not moot, the likelihood of its reoccurrence with respect to the 1991 IBT election is remote. To now determine the details of the 1996 election invites pure speculation. Thus, it is impossible to forecast whether the issues Star Market seeks to have heard—or even the factual matters out of which this cause emanates—will ever again arise.

The decision below of the Court of Appeals does not conflict but is fully in accord with every other decision issued in the context of this historic election. Now that the election is over, this Court's limited time should not be devoted to review of this case.

II. JURISDICTION WAS PROPERLY EXERCISED TO PREVENT STAR MARKET FROM INTERFERING WITH THE CONSENT DECREE.

Star Market although not a party to the Consent Decree had the power and acted to interfere with the implementation of that Decree. The Consent Decree provided for the cleansing of the hideous influence of organized crime from the IBT through election reform and the active participation of rank and file IBT members in the election process. For an IBT member to be subject to discharge—industrial capital punishment—for such participation totally frustrates implementation of the Consent Decree. The chilling effect of allowing such conduct to go unremedied travels far beyond

the member discharged. If election activities and particularly opposition to incumbent Union officers were conceived to create the possibility of loss of livelihood, it is unlikely that many—if any—IBT members would participate in the process. The Consent Decree would become an empty gesture.

This Court has long recognized that the federal courts are not so powerless. This Court has repeatedly held that the All Writs Act, 28 U.S.C. § 1651, empowers a federal court "to issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). A federal court may issue auxiliary writs to protect its jurisdiction "when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it." *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942).

That this authority permits jurisdiction to be exercised over entities such as Star Market who are not parties to the original order is beyond dispute. This Court has held that judicial power under the All Writs Act:

> extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice . . . and encompass even those who have not taken any affirmative action to hinder justice.

New York Telephone, 434 U.S. at 174 (citations omitted); *accord Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 863 (2d Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989). The All Writs Act is to be applied "flexibly in conformity with these principles." *New York Telephone*, 434 U.S. at 173. Indeed, use of the auxiliary writ power is particularly

appropriate in institutional reform litigation, where consent decrees often require "a degree of flexibility in enforcement" in order "to meet evolving conditions." *New York State Association for Retarded Children, Inc. v. Carey*, 596 F.2d 27, 37 (2d Cir. 1978), *cert. denied*, 444 U.S. 836 (1979).

In this unique context—an historic union election supervised under a consent decree and conducted under court-approved rules—the All Writs Act plainly provides the necessary authority to prevent employers from frustrating IBT members' exercise of their right to participate free from unlawful retaliation. This Court has not hesitated to exercise jurisdiction to prevent non-parties from interfering with the implementation of lawful court orders. This case is no different. The District Court properly exercised jurisdiction over Star Market when it interfered with the IBT membership's right to a free and fair election, a right which, by necessity, had to be preserved in order to achieve the Consent Decree's objectives.

III. STAR MARKET WAS AFFORDED FULL PROCESS.

The linchpin of Star Market's claim that it was denied due process is its assertion that it received no notice of the proceedings against it. (Petitioner's Brief at 10, 14-15) Yet the documentary record demonstrates the contrary and the factual findings of not only the Independent Administrator (A. 140) but of both the District Court (A. 34) and the Court of Appeals (A. 16) so hold. Writs of certiorari do not issue to review findings of fact.

Further, and assuming that the Election Officer and Independent Administrator were state actors,[2] Star Market

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[2] The Election Officer does not concede that he or the Independent Administrator are state actors in the constitutional sense, a

was fully afforded appropriate process. Due process does not require strict adherence to codes of evidence and procedure that are reserved for formal trials. This Court has consistently emphasized the flexibility of due process, noting that its fundamental requirement is "the opportunity to be heard 'at a meaningful time and in a meaningful manner'." *Mathews v. Eldrige*, 424 U.S. 319, 333 (1976) (citation omitted); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) ("due process is flexible and calls for such procedural protections as the particular situation demands"). *See also Lyeth v. Chrysler Corp.*, 929 F.2d 891, 895 (2d Cir. 1991) (due process does not guarantee any particular form of procedure).

Star Market undeniably had an opportunity to be heard before the Election Office, the Independent Administrator, the District Court and the Court of Appeals. As found by the Independent Administrator, the District Court and the Court of Appeals, it was provided notice of the allegations against it and given more than three months to prepare and submit its case. The Election Officer carefully considered the merits of the protest and rendered a detailed written decision. Star Market availed itself of the opportunity to

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necessary prerequisite to Star Market's entitlement to due process. *Blum v. Yaretsky*, 457 U.S. 991, 1002 (1982). For state action to be shown, the conduct in question "must be caused by the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible" and "the party charged with the [conduct] must be a person who may fairly be said to be a state actor". *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) The conduct of the Election Officer and Independent Administrator was not state generated, neither can they be said to be state actors. *United States v. IBT*, 941 F.2d 1292, 1295 (Senese) (2d Cir. 1991), *cert. denied*, 60 U.S.L.W. 3219 (U.S. Oct. 7, 1991) (No. 90-1904).

appeal to the Independent Administrator who held a hearing in which Star Market participated and, thereafter, issued a written decision. Star Market was also heard by the District Court and provided an opportunity to appeal to the Court of Appeals. Due process—particularly under the constraints of time imposed by the Consent Decree and its inflexible election schedule—requires no more.

No denial of due process resulted from the failure to defer to the prior arbitration award. The decisions of this Court confirm that no deferral is appropriate when a labor related claim—although cognizable under a collectively bargained arbitration provision—also emanates from a separate source of legal rights, even if such separate source is but co-extensive with the rights afforded in the collective bargaining agreement. *McDonald v. City of West Branch,* 466 U.S. 284 (1984); *Barrentine v Arkansas Best Freight Systems, Inc.,* 450 U.S. 728 (1981); *Alexander v. Gardner-Denver Co.,* 415 U.S. 36 (1974).

Even if the Consent Decree—not being an act of Congress—does not provide the same overriding impact on arbitration decisions, no disruption has or will be foisted upon the body of federal labor law by the decision below, despite Petitioner's claims. The IBT election process was a unique and singular event, an event now concluded. Its genesis was the history of mob domination of the hierarchy of the IBT and the continual and heretofore futile efforts to remove such corrupting influence. The breadth of the election undertaking mandated by the Consent Decree is unlikely to ever be repeated in the annals of American labor unions. The Court of Appeal's decision of which review is sought is based and firmly grounded upon the historic but arduous tasks supervision of such election engendered, a situation unlikely ever to be repeated. No review of that decision is required.

CONCLUSION

Based on the foregoing arguments and in accord with the decisions below, the Election Officer respectfully requests the Petition for Writ of *Certiorari* be denied.

Respectfully submitted,

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(4)

Supreme Court, U.S.
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No. 91-1674

In the Supreme Court of the United States

OCTOBER TERM, 1991

STAR MARKET COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether both courts below erred in finding that petitioner was provided notice of the election protest and an opportunity to be heard.

2. Whether the district court had jurisdiction under the All Writs Act, 28 U.S.C. 1651, to enforce the consent decree entered in this case against actions by third parties that threatened that decree.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The court of appeals' opinion (Pet. App. A7-A23) is reported at 954 F.2d 801. The district court's opinion (Pet. App. A24-A42) is reported at 776 F. Supp. 144.

JURISDICTION

The court of appeals' decision was entered on January 22, 1992. The petition for a writ of certiorari was filed on April 21, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. In June 1988, the United States filed a civil action under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, against the International Brotherhood of Teamsters (IBT) and members of the IBT General Executive Board. The complaint alleged that the IBT had long been under the control of organized crime, and sought equitable relief to rid the union of such control. See Pet. App. 10; *United States* v. *IBT*, 905 F.2d 610, 612-613 (2d Cir. 1990). In March 1989, the parties agreed to settle the action and stipulated to the entry of a consent decree incorporating the terms of their settlement agreement. Pet. App. A10.

The principal goal of the settlement and the consent decree is to wrest the union from the influence of organized crime and to establish a new system of rank-and-file elections. Pet. App. A10; *United States* v. *IBT*, 948 F.2d 98, 100 (2d Cir. 1991) (*Yellow Freight*); *United States* v. *IBT*, 931 F.2d 177, 180-181 (2d Cir. 1991). Pursuant to the consent decree, the district court appointed three officers: an Independent Administrator to oversee the decree's remedial provisions; an Investigations Officer to investigate and prosecute disciplinary charges against corrupt IBT members; and an Election Officer to oversee and certify the election process. Pet. App. A43-A49; *United States* v. *IBT*, 941 F.2d 1292, 1294 (2d Cir. 1991); *United States* v. *IBT*, 905 F.2d at 613. The authority of all three officers, with certain limited exceptions, expired with the certification of the 1991 union election results. Consent Decree 3-4.

The consent decree empowered the Election Officer to "supervise" the 1991 IBT election process. Pet. App. A49. The district court that entered the decree determined that the Election Officer's supervisory powers include the "right to promulgate electoral rules and

procedures." *United States* v. *IBT*, 723 F. Supp. 203, 207 (S.D.N.Y.), appeal dismissed, No. 89-6252 (2d Cir. 1989), cert. denied, 496 U.S. 925 (1990). Pursuant to that authority, the Election Officer proposed a set of Election Rules to govern the 1991 election and submitted the Rules to the district court for approval. The district court modified the Rules and adopted them as an order of the court, declaring the Election Rules to be the "linchpin" to the enforcement of the Consent Decree. *United States* v. *IBT*, 742 F. Supp. 94, 97 (S.D.N.Y. 1990), aff'd, 931 F.2d 177 (2d Cir. 1991); see also Pet. App. A25. The district court held that the court-adopted Election Rules "shall be enforceable upon pain of contempt." *United States* v. *IBT*, 742 F. Supp. at 108.

The Election Rules protect the rights of IBT members to participate in union election campaign activities. Pet. App. A25, A32 n.2. The Rules also set out a process for expeditiously raising and adjudicating election protests. Pet. App. A207-A211. Under that process, protests concerning the election and any alleged improper or inequitable treatment of a candidate or his/her supporters must be filed with the Election Officer, and the Election Officer then determines the merits of the protest and the appropriate remedy. Pet. App. A208-A209. Any party adversely affected by a determination may seek a hearing before the Independent Administrator. If no hearing is requested, the Election Officer's determination becomes final and binding. Pet. App. A209-A210. If a hearing is requested, the Independent Administrator conducts it and thereafter issues a written decision. That decision may be appealed to the district court. Pet. App. A210.

2. Neal J. Henderson is a member of the IBT and was employed by petitioner as a warehouseman. In Spring 1991, Henderson was elected as a delegate to the IBT convention on a slate supporting Ron Carey for IBT president. Petitioner's supervisors made disparaging

remarks to Henderson regarding his candidacy for delegate and his pro-Carey campaign activities. Pet. App. A26.

On May 2, 1991, Henderson accepted an overtime assignment, from 7:00 p.m. to 9:25 p.m., before his designated shift, which began at 10:00 p.m. It was the practice of petitioner's employees working pre-shift overtime to leave early if they completed their work. Thus, after Henderson finished his overtime assignment at 9:00 p.m. and checked whether his co-workers needed his assistance, he left the facilities. When he returned at 10:00 p.m. to begin his regular shift, he was suspended by his supervisor. On May 13, petitioner terminated Henderson because he "stole company time" by leaving early on his break on May 2. Pet. App. A26-A27.

3. Henderson filed a grievance against petitioner pursuant to the collective bargaining agreement, alleging that his termination violated the labor contract overtime provisions. Henderson also filed a protest with the Election Officer, contending that his termination was politically motivated and violated the Election Rules. The Election Officer informed petitioner about the grievance and asked petitioner to supply "all information relevant to the allegations contained in the protest." Pet. App. A140-A141. The Election Officer deferred further action until the contractual grievance-arbitration proceeding was completed. On July 17, 1991, the arbitrator ruled that petitioner was justified in discharging Henderson. The arbitrator's decision was solely based upon the collective bargaining agreement's overtime provisions and did not address whether Henderson was terminated for political reasons or whether the termination violated the Election Rules. Pet. App. A27, A35, A133-A134.

After the arbitration decision was issued, the Election Officer proceeded with the investigation and found that it was common practice for petitioner's employees to leave

the premises when finishing their work before the overtime period ended, and that Henderson was the only person ever fired for doing so. Further, the Election Officer discovered that Henderson's punishment was far more severe than those imposed on other employees for similar infractions. Pet. App. A27-A28. In September 1991, the Election Officer issued a decision finding that petitioner had discriminated against Henderson because of his election activities. The Election Officer directed petitioner to reinstate Henderson with full back pay. Pet. App. A28.

Petitioner sought a hearing under the Election Rules before the Independent Administrator to review the Election Officer's determination. By consent of the parties, the hearing was held in the form of a telephone conference. Pet. App. A13. On September 18, 1991, the Independent Administrator issued a written decision agreeing with the determination of the Election Officer. Pet. App. A137-A145.

The Independent Administrator rejected petitioner's threshold challenge to his jurisdiction to enforce the Elections Rules against an employer. Pet. App. A139. Further, the Independent Administrator ruled that the Election Officer had jurisdiction independent of the arbitrator to enforce the Election Rules. Pet. App. A141-A142. The Independent Administrator also rejected petitioner's complaint that it was denied "due process." The Independent Administrator explained that the Election Officer provided petitioner notice of the protest in May 1991 and asked petitioner to submit all relevant information. Pet. App. A139-A141.

On the merits, the Independent Administrator agreed with the Election Officer that Henderson's support of Ron Carey had been a "motivating factor" in the discharge. Pet. App. A143. The Independent Administrator held that petitioner had failed to show that Henderson

would have been discharged for cause notwithstanding his political activity. The Independent Administrator noted that the evidence had established that Henderson's sanction was far more severe than ordinary and that other employees who had also left pre-shift overtime early the same night as Henderson received no discipline whatsoever. Pet. App. A144. The Independent Administrator concluded that the only explanation for petitioner's actions was retaliation for Henderson's political activities and support of Carey. Pet. App. A144-A145.

4. Petitioner did not appeal the Independent Administrator's decision to the district court, but instead informed the government that it would not comply with the decision. Pet. App. A29. On October 24, 1991, the government filed a motion asking the court to affirm the Independent Administrator's decision and to direct petitioner to comply. *Ibid.* In response, petitioner raised a variety of objections to the Independent Administrator's decision. The district court held that petitioner had waived its objections by failing to appeal, and ordered petitioner to comply or be held in civil contempt and incur a $10,000 per day sanction. Pet. App. A30-A31, A42.

The court further held that, even if petitioner had not waived its right to contest the Independent Administrator's decision, petitioner's objections were "wholly without merit." Pet. App. A31. First, rejecting petitioner's personal and subject matter jurisdiction arguments, the court held that it had authority under the All Writs Act, 28 U.S.C. 1651, to enforce the consent decree and Election Rules against third parties who could jeopardize the fair and free elections mandated by the decree. Pet. App. A31-A33. Second, the court held that there was no violation of "due process" because the Election Officer and Independent Administrator are not state actors and because petitioner was provided ample notice and an adequate opportunity to be heard. Pet. App. A33-A34.

Third, the court held that the arbitrator's decision was not binding on the Election Officer because the Election Rules provide an independent source of rights and the arbitrator's inquiry whether the collective bargaining agreement overtime provisions were violated was entirely distinct from the inquiry into whether Henderson was terminated because of his election activities. Pet. App. A34-A36. Fourth, the court rejected the argument that the Election Officer's determination was untimely under the Election Rules. Pet. App. A36-A37. Finally, the court affirmed the Independent Administrator's decision, finding that it was "fully supported by the record." Pet. App. A37-A39.

5. Petitioner appealed to the Second Circuit, which affirmed. Pet. App. A7-A23. The court of appeals rejected petitioner's first argument that the Independent Administrator's decision violated due process. The court, relying on its earlier ruling in *United States* v. *IBT*, 941 F.2d 1292 (2d Cir. 1991), cert. denied *sub nom. Senese* v. *United States*, 112 S. Ct. 1161 (1992), held that, because the Independent Administrator was not a "state actor," his actions were not governed by the Due Process Clause of the Constitution. However, the court explained that the "state actor" issue was not significant in this case, because petitioner was entitled to procedures that would satisfy the Due Process Clause before it was sanctioned under the All Writs Act. Pet. App. A14-A15. The court held that petitioner received such procedures in this case, because it received: timely notice of the protest; more than three months to supply the Election Officer with any relevant information; an opportunity to challenge the Election Officer's determination before the Independent Administrator; the right to a hearing before the Independent Administrator; the opportunity to submit written submissions to the Independent Administrator; and the right to appeal the Independent

Administrator's decision to the district court. Pet. App. A15-A16. The court of appeals further ruled that petitioner waived any due process objections by failing to appeal to the district court. Pet. App. A16-A17.

The court of appeals also rejected petitioner's argument that the Independent Administrator's decision could not "overrule" the decision of the arbitrator. The court, adhering to its decision in *Yellow Freight*, 948 F.2d at 103-106, held that to the extent necessary to implement the consent decree and Election Rules, the Independent Administrator and the district court could properly assert jurisdiction over matters that may also be subject to arbitration under the collective bargaining agreement. Pet. App. A17-A19. The court relied on the established principle that a federal court need not defer to an arbitration decision when a plaintiff's labor-related claim stems from a separate source of legal rights. Pet. App. A19-A21.

The court further noted that the arbitrator's decision in any event did not address the retaliation claim. The court concluded that the Independent Administrator thus correctly refused to grant the arbitrator's ruling conclusive effect. Pet. App. A21. The court added that, because the objectives and scope of the consent decree differed dramatically from those addressed by the collective bargaining agreement, it was "consistent with federal labor policy" that the "Consent Decree officers and the district court remain free to complete their task unencumbered by collateral arbitration results." Pet. App. A22-A23.

ARGUMENT

Petitioner challenges the adequacy of process it was afforded in this case and argues that the enforement of the consent decree and the Election Rules improperly displaced the roles of the arbitrator and the National

Labor Relations Board (NLRB). Petitioner's claims arise under the unique and temporary regime established by the 1989 consent decree and the 1991 Election Rules. Under the terms of the decree, the authority of the court-appointed officials, with limited exceptions, expired in January 1992 with the certification of the 1991 IBT election results. Consent Decree 3-4. Similarly, the Election Rules also expired with the certification of the 1991 IBT election results. Petitioner does not assert that the decision of the court of appeals conflicts with the decisions of any other court of appeals. Accordingly, this case presents no issue of general or continuing importance warranting further review by this Court.

1. Petitioner's primary contention appears to be that it did not receive adequate notice of the charges against it before the Election Officer; that it did not in fact receive such notice until the United States had moved to hold it in contempt; and that the lack of notice deprived it of a fair opportunity to contest the charges against it. Pet. i, 5-8, 10, 11, 13, 14. Both courts below, as well as the Independent Administrator, determined that petitioner was in fact afforded sufficient notice of the charges against it. Pet. App. A16, A34, A140-A141. Those fact-bound determinations were correct and would not in any event warrant further review.

Insofar as petitioner also complains about other alleged shortcomings of the process, petitioner's complaints similarly are not well-taken. As both courts below found, the record establishes that petitioner was provided with all of the elements of due process. Petitioner was afforded more than three months to present information to the Election Officer. Pet. App. A16, A33-A34. Petitioner had a further opportunity for a hearing before the Independent Administrator, and petitioner took advantage of that opportunity when it consented to

and participated in a telephone hearing and submitted supporting written materials. Pet. App. A13, A16. Finally, petitioner had ample opportunity for district court review of the Independent Administrator's decision. Pet. App. A14, A16. Due process requires no more.

2. Petitioner waived any right to challenge the authority of the Independent Administrator and the district court. Petitioner submitted to the Election Rule remedial scheme and invoked its right to review and a hearing under the Election Rules. Now, having received an adverse decision by the Independent Administrator, petitioner attempts to collaterally challenge the authority of the district court and the court-appointed officers. However, having submitted itself to the equitable jurisdiction of the district court and the court-appointed officers, petitioner cannot now collaterally contest their equitable authority. Cf. *Langenkamp* v. *Culp*, 111 S. Ct. 330, 331 (1990) (per curiam) (a party who submits to the equitable jurisdiction of the bankruptcy court cannot contest the court's equitable authority to resolve the trustee's claims against it); *Katchen* v. *Landy*, 382 U.S. 323, 327 (1966) (same).

3. a. Petitioner also claims (Pet. 17-22) that the district court's authority under the All Writs Act to issue process to enforce its orders was not properly exerted in this case. In particular, petitioner claims that the district court should have deferred to the decision of the labor arbitrator.

The court of appeals recognized the importance of arbitration of labor disputes, but correctly held that a court is not required to defer to an arbitrator where an employee asserts rights legally independent of the collective bargaining agreement or the National Labor Relations Act, 29 U.S.C. 151-169. Pet. App. A16-A23. That principle is well-established under this Court's precedents. See *Alexander* v. *Gardner-Denver Co.*, 415 U.S.

36, 52 (1974); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). An employee can seek to vindicate federal rights associated with his employment relationship in court, as long as those rights are not dependant upon the collective bargaining agreement or the NLRA. See, *e.g.*, *McDonald* v. *City of West Branch*, 466 U.S. 284, 292 (1984) (42 U.S.C. 1983); *Barrentine* v. *Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 745 (1981) (Fair Labor Standards Act); *Alexander*, 415 U.S. at 59-60 (Title VII of the Civil Rights Act of 1964).

In this case, the election protest dispute did not arise under the collective bargaining agreement or the NLRA. Rather, it involved an alleged violation of an Election Rule. The district court overseeing the RICO consent decree believed that the Election Rules were critical to the effectuation of the decree. Pet. App. A25. In order to ensure that the decree was carried out and could not be subverted by the interference of third parties, the district court entered the Election Rules as court orders that would be enforceable under the pain of contempt. *United States* v. *IBT*, 742 F. Supp. at 108. The court-ordered election rules provide an independent source of law that can be enforced by the district court, notwithstanding the arbitrator's decision. See Pet. App. A20-A21. Indeed, the arbitrator did not purport to address the question in dispute under the Election Rules—whether Henderson's termination was motivated by his election and campaign activities. Pet. App. A21, A133-A134. The court of appeals' decision that, in the unusual circumstances of this case, the district court was not bound by the arbitrator's ruling was thus correct.*

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* Petitioner asserts that its argument is supported by this Court's decision in *Presley* v. *Etowah County Commission*, 112 S. Ct. 820 (1992). Contrary to petitioner's statement, *Presley* did not involve an effort "to enlarge the scope of a consent decree

b. Petitioner also claims (Pet. 16-17) that the courts below should have allowed the NLRB to resolve this dispute. Petitioner did not advance that claim before the court of appeals. In the court of appeals, petitioner argued that the district court should have deferred to the arbitrator or should have been bound by the arbitrator's decision; petitioner did not argue that the NLRB was the exclusive or even the proper forum to resolve this dispute. See Pet. C.A. Br. 28-35. Because petitioner failed to present its argument to the court of appeals, further review to address that argument would be unwarranted. See *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976).

Moreover, as explained by the court of appeals in its *Yellow Freight* decision, the NLRB does not have exclusive jurisdiction over matters pertaining to or necessary for the enforcement of this RICO consent decree. *Yellow Freight*, 948 F.2d at 105-106. The principle case relied upon by petitioners, *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1959), is not to the contrary. Pet. 16-17. *Garmon* holds that state regulations must ordinarily yield to the NLRB's primary jurisdiction over unfair labor practice disputes. *Garmon* does not address the enforcement of independent federal rights that flow from the Consent Decree or the scope of a district court's power to enforce that decree under the All Writs Act. Nothing in the

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originally arising under the Voting Rights Act, 42 U.S.C. § 1973c." Pet. 20. Instead, *Presley* addressed the question whether a change affecting "only the allocation of power among governmental officials" must be precleared under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. 112 S. Ct. at 832. Although one of the parties in *Presley* had been subject to a consent decree, see 112 S. Ct. at 825, this Court's decision in *Presley* had nothing to do with the application or enforcement of the decree.

court's order in this case precludes the enforcement of rights under the NLRA by the NLRB.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-1674

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA,
Respondent,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA;

[Defendants continue on overleaf]

STAR MARKET COMPANY,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[Defendants cont'd from front cover]

ANTHONY SALERNO, also known as Fat Tony; MATTHEW IANNIELLO, also known as Matty the Horse; NUNZIO PROVENZANO, also known as Nunzi Pro; ANTHONY CORALLO, also known as Tony Ducks; SALVATOR SANTORO, also known as Tom Mix; CHRISTOPHER FURNARI, SR., also known as Christie Tick; FRANK MANZO, CARMINE PERSICO, also known as Junior, also known as The Snake; GENNARO LANGELLA, also known as Gerry Lang; PHILLIP RASTELLI, also known as Rusty; NICHOLAS MARANGELLO, also known as Nicky Glasses; JOSEPH MASSINO, also known as Joey Messina; ANTHONY FICAROTTA, also known as Figgy; EUGENE BOFFA, SR.; FRANCIS SHEERAN; MILTON ROCKMAN, also known as Maishe; JOHN TRONOLONE, also known as Peanuts; JOSEPH JOHN AIUPPA, also known as Joey O'Brien, also known as Joe Doves, also known as Joey Aiuppa; JOHN PHILLIP CERRONE, also known as Jackie the Lackie, also known as Jackie Cerrone; JOSEPH LOMBARDO, also known as Joey the Clown; ANGELO LAPIETRA, also known as The Nutcracker; FRANK BALISTRIERI, also known as Mr. B; CARL ANGELO DELUNA, also known as Toughy; CARL CIVELLA, also known as Corky; ANTHONY THOMAS CIVELLA, also known as Tony Ripe; GENERAL EXECUTIVE BOARD, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; JACKIE PRESSER, General President; WELDON MATHIS, General Secretary-Treasurer; JOSEPH TREROTOLA, also known as Joe T, First Vice President; ROBERT HOLMES, SR., Second Vice President; WILLIAM J. MCCARTHY, Third Vice President; JOSEPH W. MORGAN, Fourth Vice President; EDWARD M. LAWSON, Fifth Vice President; ARNOLD WEINMEISTER, Sixth Vice President; JOHN H. CLEVELAND, Seventh Vice President; MAURICE R. SCHURR, Eighth Vice President; DONALD PETERS, Ninth Vice President; WALTER J. SHEA, Tenth Vice President; HAROLD FRIEDMAN, Eleventh Vice President; WALTER J. COX, Twelfth Vice President; DON L. WEST, Thirteenth Vice President; MICHAEL J. RILEY, Fourteenth Vice President; THEODORE COZZA, Fifteenth Vice President; DANIEL LIGUROTIS, Sixteenth Vice President; and SALVATOR PROVENZANO, also known as Sammy Pro, Former Vice President,

Defendants.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

UNITED STATES OF AMERICA,

Respondent,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO; THE COMMISSION OF LA COSA NOSTRA;

[Defendants continue on overleaf]

STAR MARKET COMPANY,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF PETITIONER IN REPLY

In this Reply, Star Market Company ("Star Market") challenges the United States' claims that it somehow waived its subject matter jurisdiction claim or its claim of denial of its most basic due process rights. Star Market challenges as well the purported "right" of a court-appointed *Teamster* to reverse an impartial arbitration award to "enforce" *internal* Teamster remedies.

There is NO mootness in this case. The very real injury which Star Market suffered continues to this very day – forced to employ an employee, whose discharge was unequivocally upheld in a final and binding, impartial arbitration.

I. STAR MARKET HAS PRESERVED ITS RIGHTS TO CHALLENGE THE JURISDICTION AND AUTHORITY OF THE COURT-APPOINTED TEAMSTERS *AND* THE DISTRICT COURT TO OVERTURN THE RESULTS OF AN IMPARTIAL ARBITRATION AWARD.

A. THERE HAS BEEN NO WAIVER OF STAR MARKET'S CHALLENGE TO SUBJECT MATTER JURISDICTION.

The United States argues that the there has been a waiver by Star Market of subject matter defenses. In the brief to the Court of Appeals, Star Market specifically preserved its subject matter jurisdiction claims originally raised in the District Court (C.A. p. 12, n.6). This was done despite the fact that the Second Circuit had recently rejected these claims in a divided panel decision in *United States v. IBT (Yellow Freight),* 948 F.2d 98 (2d 1991). In response, the Court of Appeals specifically addressed Star Market's challenge to subject matter jurisdiction in its Opinion (A-18). Moreover, subject matter jurisdiction of a court may be challenged at any time. *See* Fed.R.Civ.P. 12(h)(3). Indeed, when in doubt, this Court, *sua sponte*, will inquire into its jurisdiction over subject matter. *Bender v. Williamsport Area School District*, 475 U.S. 534, 541, *reh'g denied*, 476 U.S. 1132 (1986); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588 (1939). Thus, the issue of whether the District Court properly asserted jurisdiction over this dispute is squarely before the Court.

It was once settled that the NLRB has exclusive jurisdiction to hear and decide disputes which *even arguably* impact rights guaranteed by sections 7 and 8 of

the NLRA. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). Claims of anti-union animus, as alleged by Henderson and found by the Election Officer, fall squarely within the Board's exclusive jurisdiction. *Radio Officers Union v. NLRB*, 347 U.S. 17 (1954). Therefore, the courts below improperly asserted subject matter jurisdiction over this dispute.

B. STAR MARKET DID NOT VOLUNTARILY SUBMIT ITSELF TO THE JURISDICTION OF THE COURT-APPOINTED TEAMSTERS OR THE DISTRICT COURT.

The United States also claims that Star Market "submitted to the Election Rule remedial scheme", thus waiving its rights to protest (Opp. 10). Star Market never "submitted" to the alleged authority of the court-appointed officers or the District Court in this case. Once the Teamster Election Officer attempted to assert his authority over Star Market alone, as opposed to the issue of Teamster involvement in the joint Committee, discussed below, Star Market resisted the attempts of the court-appointed Teamsters and the District Court to exercise power over its collectively bargained rights.

II. STAR MARKET WAS NEVER NOTIFIED THAT IT ALONE WAS THE SUBJECT OF A TEAMSTER ELECTION PROTEST.

The United States argues that Star Market received full due process, including adequate notice of the proceedings against it. This entire argument *presumes*, as did the Second Circuit in error, that Star Market was served notice of an election protest that accused it of an election rule violation *by discharging Henderson*. This presumption is absolutely necessary for the United States. Otherwise, there existed no charge to which Star Market *could have responded* "to present information to the Election Officer" (Opp. 9). The actual *record* is clear and undisputed, however, that Star Market was never

notified that it had been accused of election rule violations in its *discharge* of Henderson until the hearing before the district court (A190-91). No *record* fact contradicts this *record* assertion, nor is there even an attempt by the United States or the courts below to address it. The opinion of the Court of Appeals simply failed to distinguish between the *two separate* election protests and assumed that both were the same. A review of the two protests (A61, A62) demonstrates how serious a due process error this is.

Only the second protest (A62) would give Star Market, or any reasonable employer, any reason to believe that *it* had become the target of the Teamster Election Officer's investigation into the *substance* of the discharge. This is the lack of notice — to which Star has consistently objected (A212). Thereafter, petitioner declined to comply with the orders of the court-appointed Teamsters, forcing them to act, hopefully in accordance with settled legal principles. The United States described what happened next simply as:

> ". . . the government filed a motion asking the court to affirm the Independent Administrator's decision and to direct petitioner to comply". (Opp. 6).

Conveniently, no mention is made of the threats of contempt, both civil and criminal, and the large daily fines threatened *by the United States* in this enforcement effort purportedly by "private parties" (A147, A220). Petitioner specially appeared before the District Court to challenge that Court's authority, first to reach it at all, then to overturn the results of an impartial arbitration award (A172). The United States would equate Star Market's special appearance, under threat of contempt, into an acquiescence to the District Court's jurisdiction.

An assertion is made that this waiver argument is supported by *Langenkamp v. Culp*, __ U.S. __, 111 S.Ct. 330, 112 L. Ed. 2d 343 (1990), *reh'g denied*, __ U.S. __, 111 S.Ct. 721, 112 L. Ed. 2d 709 (1991) and *Katchen v.*

Landy, 382 U.S. 323 (1966). However, both *Langenkamp* and *Katchen* involved creditors who *voluntarily* submitted their claims against a bankrupt estate and then sought to escape the bankruptcy court's equitable jurisdiction when sued by the trustee. Had Star Market simply appealed the Independent Administrator's decision to the District Court, those cases might be relevant. They are not, however, here. Star Market was "ordered" to appear before the District Court and did so under penalty of contempt (A171). Star Market never voluntarily submitted to any of the proceedings below and has waived none of its rights.

III. STAR MARKET WAS ADJUDGED BY A PARTIAL AND ADVERSE COURT-APPOINTED, QUASI-JUDICIAL TEAMSTER.

In its due process argument, the United States omits any response to the lack of *impartiality* by the Teamster Election Officer as a decision maker in the Consent Decree's quasi-judicial scheme. It did so for obvious reasons. The Election Officer was a court-appointed *Teamster* with broad power *over Teamsters and obliged to protect the rights of Teamsters*. He was not appointed to protect the rights of employers. Thus, by definition, the court-appointed Teamster officers were not impartial. They were sworn to favor and vindicate the interests of Teamsters.

If it were to be judged at all, Star Market had a right to an impartial judge. It was faced instead by a "judge" who was sworn to defend the rights of Star Market's accuser. While the United States argues that all due process requirements were met, including apparently the right to an impartial decision maker, the very essence of partiality which taints this case warrants a repudiation by this Court of the proceedings below.

IV. THE ASSERTION OF ALLEGED INDEPENDENT RIGHTS IS A PRETEXT TO AVOID THE RESULTS OF ARBITRATION.

The United States relies upon a series of opinions by this Court[1] to suggest that "a court is not required to defer either to an arbitrator or the NLRB where an employee asserts rights legally independent of the collective bargaining agreement or the National Labor Relations Act" (Opp. 10). This argument fails to acknowledge that all cited cases deal with separate legislative remedies that provide alternative forums. The United States' position in this case serves only to undermine arbitration as a source of labor peace and would help to foster the piecemeal creation of *ad hoc* litigation-based rights, the only result of which is to circumvent arbitration. *Gilmer v. Interstate/Johnson Lane Corp.*, __ U.S. __, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

In *Gilmer*, this Court considered the alleged inadequacies of arbitration and rejected its prior reservations to permit arbitration *finally* to resolve federal statutory claims. While the *Gilmer* case distinguishes its holding as not reaching that of *Alexander*, the present matter gives the Court a clear opportunity to extend its endorsement of arbitration as the principle mechanism for dispute resolution.

The United States argued, and the Second Circuit apparently accepted, that the District Court's Election Rules serve as a source of law to create an independent cause of action which somehow need not be arbitrated – this even though the entire incident arose out of a collectively bargained work relationship. This argument should be rejected for several reasons. Labor arbitration has long been viewed by this Court as a fundamental source of labor peace. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960). In relying on

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1. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

Alexander in the circumstances of this case, the United States would expand the "independent rights" doctrine beyond recognition and thereby gut labor arbitration's efficacy. Given a ready avenue to avoid arbitration where other litigation of almost any nature is ongoing, there would be no limit to the danger for piecemeal, *ad hoc* adjudication of "rights", each designed to cut through the red tape of due process and achieve a current, social goal. Like hearsay, the exceptions can be predicted to overwhelm the rule.

Even if rights *against employers* were created by the Election Rules, where the dispute involves parties to a collective bargaining agreement, there is no reason for that dispute to be resolved outside of the bargained-for arbitration process. The United States' assertion of this new source of Teamster "rights" endorses the notion that only it or its hand-picked annointees are capable of discerning what those "rights" ensure and what other, more commonly recognized rights are preempted. Here, impartiality is lost and a forum is created where only the government, and its latest social agenda, can win.

The United States Attorney and the District Court seek to achieve social ends, admittedly laudable, cast as new or implied "rights", beyond any otherwise imaginable. For example, how could it be suggested that, without legislative support, even the Attorney General or any federal court could simply step in and force *all employers* to submit to quasi-judicial proceedings, *judged by an union official, court-appointed or elected, and enforced by the federal courts' contempt power, solely seeking to enforce union member's rights.* It is almost absurd to suggest it in any context even during the state of war.

No law, regulation, rule or Opinion of this Court has ever authorized the government to do anything like this. These new "rights" have become a guise to avoid due process for a laudable end. This unwarranted expansionism by the government to create new "rights" to enforce social ends has been recently rejected by the Court in

Presley v. Etowah County Commissioners et al., __ U.S. __, 112 S.Ct. 820, 117 L. Ed. 2d 51 (1992), and should be rejected by the Court in this case as well.

V. THE CONTINUING INJURY TO STAR MARKET PRECLUDES MOOTNESS.

It is also remarkable that the first argument of the Teamster Election Officer is that the Teamster election is now "over". Star Market had argued that the Teamster Election Officer acted with an "end justifies the means" philosophy. Nothing demonstrates this proposition more than the Election Officer's own argument. Are clear denials of due process and the unjustified erosion of the well-established arbitration process in this case unworthy of this Court's consideration because a court-appointed Teamster assures this Court that further abuses are unlikely to reoccur?

Bluntly put and recast simply that argument is: if the Teamster Election Officer made a mistake, it was in all in a good cause, *no Teamster was hurt by it* and thus is not worth this Court's time.

Due process and its preservation has been, is and always will be worth this Court's closest attention, as this Court has so often demonstrated. To accept the Teamster Election Officer's invitation to let the matter drop as a bygone event is to accept that the denial of due process as an issue of quantity and frequency, not quality, and that an admirable result excuses indefensible means.

CONCLUSION

Star Market respectfully asks the Court to vindicate the value of impartial labor arbitration and accord to it the same recognition which the Court has recently extended to arbitration under other circumstances. Further, the Court should reaffirm the long defined mandates of due process and specifically extend them to the Consent Decree setting so as to preclude future abuse by the handpicked annointees of the government.

Respectfully submitted,

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